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THE

LAW OF PERSONS

AND OF

DOMESTIC RELATIONS

SECOND EDITION
Thoroughly Revised

BY

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PREFATORY NOTE TO THE FIRST EDITION

This book is the outgrowth of a course on Domestic Relations, delivered for nine years in the Yale University Law School. The object constantly kept in view in the preparation of the book has been the practical benefit and convenience of both instructor and student. To this end the selection of cases has been chiefly of American, rather than of English, cases; and of the recent, "ruling cases," which contain a broad discussion of the topic in question, with a review of the prior decisions, rather than of the "leading cases," earlier in date, and in which the doctrines were first propounded which have been developed in later cases.

I have intended to make a book of a size and scope that could be reasonably covered in such a course as is usually given in the law schools on this topic.

I wish to call particular attention to the cases printed in black-letter type in the notes. It has been my practice in giving this course by lecture to assign in connection with each lecture a group of illustrative cases, which the students were expected to read, and be prepared to recite upon together with the contents of the lecture. I have found this method very serviceable. The cases illustrate clearly the propositions stated in the lecture; and the reading of the cases fixes the matter vividly in their minds. Used in connection with the text-book, that method would have the advantages which attach to the use of a case-book in connection with a text-book, except for the convenience of having the selection of cases in convenient form in the students' hands; and I am sure that most instructors will agree with me that there are decided compensations in requiring the students to examine the cases in the actual reports.

To facilitate the use of these black-letter cases, I have

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usually selected cases which were reported in one or more sets of reports besides the official volumes, so that in a large class each student would be able to get access to a report of the case in the library.

In the older text-books the subject of Domestic Relations included a well-settled group of subordinate topics. These were usually Husband and Wife, Parent and Child, Guardian and Ward, Master and Servant, and Infancy.

In some recent text-books and case-books the subject of Master and Servant is omitted. It is probably thought that the older relations of the servant which are really *domestic* relations, such as those of the household servant or of the apprentice, are of too little importance to require special treatment; and that the modern topic of employer and employee is too large and complex, and too dissimilar to the other subordinate topics, to be profitably treated in this connection.

But it seems to me that there are great advantages in including the topic of Master and Servant, or Employer and Employee, in a course on Domestic Relations.

In the first place, many other topics included within this subject are somewhat elementary, and do not attract the eager attention of the student; but the subject of Employer and Employee is so full of up-to-date interest that it stimulates the entire course, making it more satisfactory to both the instructor and the student.

This would hardly be a legitimate reason for including it within the subject, if it did not properly belong there; but I am persuaded that it does. Some parts of the law of Employer and Employee may be covered by the course on Torts, some parts of it by the course on Contracts, and some parts by the course on Agency. But there seems to be no other course in which the relation of Employer and Employee as a whole can be considered.

The law covering the rights of Employer and Employee has become so complex, and depends to so great an extent

upon the implications of the law, and so little upon the express contract between the parties, that it has come to have much the character of a status, rather than of a contract relation.

While the law covering the employer's liability came properly within the subject of torts in the common law view of that liability, the new doctrine embodied in the employees' compensation acts takes the question entirely out of the field of the law of torts.

Of course the subject can only be treated briefly, and in its main outlines, within the scope of a text-book on Domestic Relations. But it seems useful to include the broad outlines of the subject, and I have accordingly done so.

The several subordinate topics above named have usually been treated as unrelated topics. It seems that this is hardly logical. The relation of Parent and Child, and still more the substitute relation of Guardian and Ward, grow directly out of the disabilities of infancy; and those relations continue only during the continuance of infancy.

The entire subject has been therefore grouped into three parts: The Law of Marriage, including Marriage and Divorce, and also the personal and property rights of Husband and Wife; the law of Infancy, covering the status of Infancy, and also the protective relations of Parent and Child and Guardian and Ward; and the law of Master and Servant, or Employer and Employee.

EPAPHRODITUS PECK.

BRISTOL, CONNECTICUT, January, 1913.

PREFACE TO THE REVISED EDITION.

The call for a new edition of this book gives opportunity for restudying the scope of the subject, and the topics that should be included. In the "Prefatory Note" to the first edition the inclusion of the topic Master and Servant was discussed, and justified because of the great practical importance of the topic and the interest which it added to the course, although it was admitted that its logical relation to the general subject was debatable, and that it could only be treated in brief outline within the scope of an elementary text-book on Domestic Relations.

The reasons then suggested for its inclusion are now of much less force. In almost every state Workmen's Compensation Acts have been passed, which remove the question of the employer's liability for industrial accidents from the field of general law to that of statutory interpretation. These acts have also very greatly lessened the amount of litigation growing out of such accidents, and consequently the importance and interest of this field of the law to the practitioner or student. The economic and constitutional questions involved in such statutes, which were a matter of eager debate seven years ago, have been substantially settled by legislation and judicial decision; and this has rendered obsolete much of the matter contained in Chapter XX of the former edition.

On the other hand, the war has given new interest to the subject of the rights and disabilities of aliens, especially of enemy aliens, and has necessitated a new study of those questions by the English and American courts. The subject also of Insane and Incompetent Persons, their rights and liabilities, evidently belongs peculiarly to the Law of Persons.

My publishers and myself have therefore agreed that it will be more serviceable, as well as more logical, to entirely omit in this edition the topic of Master and Servant, and to insert those of Insane and Incompetent Persons, and of Aliens.

The traditional title for this field of law was Domestic Relations. In recent years it has been common to treat it under the title, The Law of Persons; and the two phrases have often been considered as synonymous. But it seems to me that they are entirely distinct, although closely related, and should be so treated. The only point at which they overlap is in treating the disabilities of married women, which topic is really a part of the law of persons, but so connected with the relation of husband and wife that it seems necessary to treat it under that head.

Accordingly I am entitling this book in its revised edition The Law of Persons *and* Domestic Relations, instead of Persons *or* Domestic Relations. The Law of Persons includes those topics which relate to persons not having the normal powers of an adult citizen; while the phrase Domestic Relations covers those mutual relationships which exist, not in business nor in political life, but in the home.

The analysis of the topic is therefore as follows: the Law of Persons in three parts, viz., Infants, Insane and Incompetent Persons, and Aliens; the Law of Domestic Relations in three parts, viz., Husband and Wife, Parent and Child, Guardian and Ward. Marriage and Divorce, while a part of the general topic of Husband and Wife, is of sufficient interest and importance to be especially mentioned as a sub-topic.

I wish to emphasize again the feature referred to in the former preface, namely, the cases printed in black letter type in the notes. I feel quite sure that in law schools not using the case system extensively it would be a very desirable feature of the instruction on this topic to regularly refer these black letter cases to the students for examina-

tion and discussion in class. In the former edition the emphasis given to them in printing was so very slight as to rather obscure this feature; but in the present edition I have taken pains to have them stand out more clearly in the printed text, and have also somewhat increased the number of such black letter cases. Most of those added in this edition are recent cases which contain full discussions of the former cases and of the present state of the law.

The principal change in making this edition, other than the dropping of one topic and the adding of two new topics as stated above, has been the insertion of newly decided cases of importance in the notes, and frequent additions to the text required by such new decisions. In some cases, as in section 99, the change of the law effected by recent decisions has required a complete rewriting of the text. Sections 48 and 53 are wholly new; and a comparison of the present edition with the former would show that hardly a single page remains entirely unaltered. I sincerely hope that this restudy of the subject in the light of changed conditions and of new decisions will make the book of timely service to present day students, and will justify a continuance of the favor which has been shown to it by instructors and students since its first appearance.

EPAPHRODITUS PECK.

BRISTOL, CONNECTICUT, June, 1920.

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A

THE LAW OF PERSONS

PART I

THE LAW OF INFANCY

CHAPTER I

INFANCY

§ 1. The commencement and duration of infancy. Infancy may be defined as the state of a person who is denied full legal powers because of his youth. Infancy begins with the beginning of life, and terminates at the age of full contractual capacity fixed by law.

What then is, in the eye of the law, the beginning of life? Three periods have been given, in different branches of the law, as the answer to this question: first, the time of conception when, biologically speaking, life actually begins; secondly, the time of the first active motion of the child felt by the mother in the womb, commonly called the time of "quickening," when it is supposed that the child begins to have a power of motion independent of the mother; and thirdly, the time of birth, when the wholly independent life of the child begins.

Blackstone states that life begins with the stirring of the infant in the womb; and supports this by saying that to kill a child after quickening by violence to the mother, or by administering a potion to her, is, though not murder, homicide or manslaughter. But he adds that "the modern law" (that is, of course, the law of 1758) "doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemeanor."[1] But if the child be born alive,

1—1 Bl. Com., 129; **Com. v. Parker, 9 Metc. (Mass.) 263, 42 Am. Dec. 396.**

"Si sit aliquis qui mulierem pregnantem percusserit, vel ei venenum dederit, per quod fecerit abortivum, si puerperium jam formatum vel animatum fuerit, et maxime si animatum, facit homicidum." Bracton, 121.

"If a woman be quick with child, and, by a potion or otherwise, killeth it in her womb, or if a man beat her, whereby the child

and afterward die from the injuries received before birth, it is murder or manslaughter, as the circumstances of the act may determine.[2]

It is evident that this statement of the criminal law does not give full support to the general doctrine that the child's life begins with the quickening in the womb; for if such a child were really regarded as a living person, its intentional killing would be murder. In fact, such offenses are usually prosecuted under special statutes in relation to producing miscarriages or abortions, rather than under the law of homicide.

An evident disadvantage in adopting the time of quickening in the womb as that of the beginning of life is that that time must often be most uncertain, depending in fact on the strength and activity of the unborn child, and depending for the purposes of proof on the testimony of the mother, which would often be that of an interested witness, and almost always uncertain and unreliable.

Nevertheless Blackstone's statement, and the older authorities on which he relies, have been generally regarded as setting the common law on this subject, so far as criminal jurisprudence is concerned.[3]

dieth in her body, and she is delivered of a dead child, this is a great misprision and no murder."

Lord Coke, 3 Inst. 50.

It is held that the killing of a child is not murder unless it has been fully born alive, and a circulation has been established independent of that of the mother. State v. Winthrop, 43 Iowa 519, 22 Am. Rep. 257.

See also Harris v. State, 28 Tex. App. 308, 19 Am. St. Rep. 837; and State v. Prude, 76 Miss. 543.

2—4 Bl. Com. 197; Clarke v. State, 117 Ala. 1, 67 Am. St. Rep. 157.

Queen v. West, 2 C. & K. 784, 2 Cox C. C. 501, 61 E. C. L. 784, was a case where the prisoner was indicted for performing an illegal operation on the mother, whereby the child was prematurely born, and by reason of its immaturity and consequent weakness died in a few hours. The court charged that this constituted murder, but the prisoner was acquitted by the jury.

3—State v. Cooper, 2 Zabr. (22 N. J. L.) 52, 51 Am. Dec. 248.

Where a statute made it a crime to cause the miscarriage of a woman, resulting in the death of the child, it was held that the offense could not be committed unless the child had "quickened" in the womb, although the language

But for all purposes of descent it is well settled that the child has a legal existence and legal right of inheritance from the moment of conception.[4]

Such a child, a child "*en ventre sa mère*," as the law-French phrase is, will take its share with other children of an intestate estate, or take the whole estate if it is the sole heir,[5] will take under a legacy or devise to "children," "grandchildren," or "heirs,"[6] and it has even been held that under a bequest to "my grandchildren, that is to say, to such of them as may be living at my decease," a child

of the statute was "a woman with child," and that phrase had been substituted for the words "pregnant with a quick child" in a previous statute. The court said that the death of a child could not be caused unless it had become a living child. "But until the period of quickening there is no evidence of life; and whatever may be said of the foetus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for the reason that the foetal movements are the first clearly marked and well-defined evidences of life."

Evans v. People, 49 N. Y. 86.

4—4 Kent's Com. 249; **Hall v. Hancock, 15 Pick. (Mass.) 255, 26 Am. Dec. 598;** Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480; Laird's Appeal, 85 Pa. St. 339; State v. Soale, 36 Ind. App. 73; Nelson v. Galveston R. Co., 78 Tex. 625, 22 Am. St. Rep. 81, 11 L. R. A. 391.

In the great case of Thelluson v. Woodford, 4 Ves. Jr. 227, Mr. Justice Buller said (p. 322): "Such a child" (that is, a child en ventre sa mère), "has been considered as a nonentity. Let us see what this nonentity can do. He may be vouched in a recovery, although it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian;" and on p. 323: "Why should not children en ventre sa mère be considered generally as in existence? They are entitled to all the privileges of other persons."

5—Harper v. Archer, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472; Detrick v. Migatt, 19 Ill. 146, 68 Am. Dec. 584. The latter case is based on a statute.

6—Jenkins v. Freyer, 4 Johns. Ch. (N. Y.) 47; Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480; Smart v. King, Meigs (Tenn.) 149, 33 Am. Dec. 137.

Contra, Annistead v. Dangerfield, 3 Mumf. (Va.) 20, 5 Am. Dec. 501; Myers v. Myers, 2 McCord Ch. (S. C.) 214, 46 Am. Dec. 648.

7—Hone v. Van Schaick, 3 Barb. Ch. (N. Y.) 489; Hall v. Hancock, 15 Pick. (Mass.) 255, 26 Am. Dec.

born not less than nine months after the testator's decease will take his share.[7]

It is a well-known historical fact that in monarchical countries the crown has often descended to unborn children, and has sometimes been in abeyance until it was determined whether the unborn child was a prince or a princess.

So under statutes giving a right to recover for the tortious death of a person to the next of kin who are damaged by such death, that right may vest in an unborn child, who may sue therefor after his birth.[8]

But these rights of an unborn child are only inchoate, and conditional on its subsequent birth; and if the child is never born alive it is as if it had never existed; no other person can take by inheritance from the child.[9]

598. See also Laird's Appeal, 85 Pa. St. 339.

In Pearce v. Carrington, L. R. 8 Ch. Ap. 969, a bequest on condition that testator's daughter should be living five years after the death of her mother, and should not then have any child, was held not to take effect when the daughter gave birth to a child six months after the five-year period expired.

8—**Nelson v. Galveston R. Co., 78 Tex. 625, 22 Am. St. Rep. 81, 11 L. R. A. 391;** Quinlen v. Welch, 69 Hun (N. Y.) 584, affirmed without passing on this question, 141 N. Y. 158; Tex. & Pac. R. Co. v. Robertson, 82 Tex. 657, 27 Am. St. Rep. 929; State v. Soale, 36 Ind. Ap. 73; Chi. & Alt. R. Co. v. Logue, 47 Ill. Ap. 292.

But if the mother had already brought an action for the death of her husband, and obtained judgment and satisfaction, and a child is thereafter born, it cannot bring a second action. Daubert v. Western Meat Co., 139 Cal. 480, 96 Am. St. Rep. 154.

9—Marsellis v. Thalhimer, 2 Paige Ch. (N. Y.) 35, 21 Am. Dec. 66; Harper v. Archer, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472.

A court has no jurisdiction to order partition of lands between a living heir and an unborn child of whom the mother is supposed to be pregnant. Gillespie v. Nabors, 58 Ala. 441, 31 Am. Rep. 20.

"Although *filius in utero matris est pars viscerum matris*, yet the law in many cases hath consideration of him in respect of the apparent expectation of his birth." Lord Coke in Bedford's Case, 7 Co. 8b.

An unborn child is in life "as to every purpose where it is for the benefit of the child." But as respects the rights of others claiming through him, the child, if it is born dead, or at such an early stage of pregnancy as to be incapable of living, is considered as if it had never been born or con-

As to injuries done to the unborn child itself, it seems to be the law that no right of action can vest in it; and that consequently it cannot, after birth, maintain an action therefor. Viewed with regard to such an injury the child is regarded as still *pars viscerum matris*, not within the scope of any contract for the exercise of care which may have been made with the mother, nor able to acquire a right of action for any tortious act.[10]

ceived. Children born within the first six months of pregnancy are presumed to be incapable of living, and therefore cannot take and transmit property by descent unless they actually survive long enough to rebut that presumption. Marsellis v. Thalhimer, supra. This case was one of birth by a Caesarian operation.

10—**Allaire v. St. Luke's Hospital, 184 Ill. 359, 75 Am. St. Rep. 176, 48 L. R. A. 225;** Walker v. R. Co., L. R. 28 Ir. 69, 26 Am. L. Rev. 50; Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 422; Buel v. United Railways Co, 248 Mo. 126, Ann. Cas. 1914 C 613 and note, 45 L. R. A. (N. S.) 625 and note; Gorman v. Budlong, 23 R. I. 169, 91 Am. St. Rep. 629, 55 L. R. A. 118.

Walker v. R. Co. was a case of injury in a railway accident, where the liability of the defendant was based, partly at least, on implied contract; there it might well be said that the company owed no duty to the passenger for whom it received no fare, and of whose existence it had no knowledge. In Dietrich v. Northampton the child was of less than five months' growth, and only lived for an instant after birth if at all. Judge Holmes rested his opinion largely on these facts, and on the entire lack of independent life of the child, which had not reached the period of "quickening."

The Missouri and Rhode Island cases were based on negligence, and the courts followed the earlier decisions with little discussion of principle.

But in Allaire v. St. Luke's Hospital every element was present to support the plaintiff's action. The defendant was a maternity hospital, to which the plaintiff's mother had gone for her confinement; it knew therefore of the plaintiff's existence, and the proper care of the child as well as of the mother was the very thing contracted for. That injury might result to the child from any violence done to the mother must have been known to the defendant. By the negligence of an elevator man the mother was badly crushed, and the plaintiff when born was crippled and misshapen. To deny the plaintiff any redress for the grievous damage suffered by him as the direct result of the defendant's negligence and breach of contract seems to work a manifest and great injustice. One judge dissented.

Since the mother's right of recovery could hardly include damages for the permanent injuries resulting to the child, there seems to be an injustice in the law as above stated; but it is at present unquestionably the law of the cases.

The law on this point may be briefly summarized, therefore, by saying that in the law of inheritance life begins at the moment of conception; in the criminal law at the time of "quickening;" and as to his right to acquire a right of action for a personal injury, only at birth.

The termination of infancy is by the common law at the age of twenty-one; and this is the universal American rule, except that in seventeen American states, including only Vermont of the Eastern states, a girl is of age at the age of eighteen.[11]

The infant attains his full legal age at the first moment of the day before the twenty-first anniversary of his birth. This results from the fact that the law does not try to estimate parts of days; but includes as a day any day of which a part has elapsed. Consequently, when a child born upon the first day of January has lived to and for a part of the thirty-first day of the next December, he has, in legal theory, lived three hundred and sixty-five days, or a full year.[12]

§ 2. **The capacity of an infant as to matters other than contract.** While a person is in legal terminology an infant to the full age of twenty-one, it is manifest that his actual powers and capacities are constantly increasing with his increasing age. An infant of a few months old is by nature incapable of any act of which the law can take cognizance; on the other hand, an intelligent young man or woman of nineteen or twenty may be more competent to make contracts or to do any act calling for sound judgment than

11—The Am. & Eng. Encyc. of Law (2nd ed.) XVI, 262, note 4, gives the following states as those in which a girl is of age at 18: Arkansas, California, Colorado, Dakota, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oregon, Vermont and Washington.

12—**State v. Clark, 3 Harr. (Del.) 557;** Bardwell v. Purrington, 107 Mass. 419; Ross v. Morrow, 85 Tex. 172, 16 L. R. A. 542.

many older men. From one stage to the other natural capacity increases.

And the law recognizes this fact by giving to the youth, while still in his minority, many legal powers; and by making even his contracts sometimes binding, and sometimes voidable only, instead of void.

Thus an infant under seven is conclusively held incapable of committing a crime. A youth under fourteen is presumed incapable of crime, but may be shown by evidence to have been in fact capable mentally and physically; above fourteen he is presumed capable.[13]

13—4 Bl. Com. 23, which gives an interesting statement of the ancient Saxon law, as well as of the common law of England; Allen v. United States, 150 U. S. 551; Com. v. Mead, 10 Allen (Mass.) 398; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494 and note; Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; People v. Domenico, 45 Misc. (N. Y.) 309; Law v. Commonwealth, 75 Va. 885, 40 Am. Rep. 750.

"Proof that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the requirements of the law. It must be shown that he had sufficient discretion to understand the nature and illegality of the particular act constituting the crime. It is not required that proof of discretion should be made by direct and positive testimony. In most instances circumstances of education, habits of life, general character, moral and religious instruction, and oftentimes the circumstances connected with the offense charged, will be sufficient to satisfy the jury that the defendant had the discretion required to render him responsible for the crime." Carr v. State, 24 Tex. Ap. 562, 5 Am. St. Rep. 905.

It is said in State v. Yeargan, 117 N. C. 706, that an infant under fourteen is not liable to prosecution unless the facts exhibit brutal passion, the use of a deadly weapon, an aggravated battery or mayhem, where malice and wickedness supply the want of age. A child of thirteen was accordingly held not punishable for "shooting craps."

As to the criminal liability of a school boy (age not stated) for throwing a stone at another boy in sport, see Hill v. State, 63 Ga. 578, 36 Am. Rep. 120.

As to the special considerations applying to the physical ability of a boy under fourteen to commit rape, see Heilman v. Com., 84 Ky. 457, 4 Am. St. Rep. 207; Williams v. State, 14 Ohio 222, 45 Am. Dec. 536; Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. Rep. 592; State v. Fisk, 15 N. D. 589.

By the common law infants might marry at the supposed age of puberty: fourteen years for boys and twelve for girls; and while the age of legal marriage is by statute commonly made later than by the common law, it is still everywhere earlier than the age of legal majority.[14]

Children of fourteen or over have the right to choose their own guardians, subject to the approval of the court.[15]

At common law boys of fourteen and girls of twelve could make a will of personal property, but of real estate only at full age.[16] But by the statutes now in force in England and in many of the states no one under twenty-one can make a will, while in other states the age limit is lower.

As a general rule, no civil office can be conferred upon an infant. That disability certainly applies to all judicial and legislative offices, and to executive offices of the higher grade, such as require the exercise of judgment and discretion. But it has been held that an infant may hold some minor offices, in which the duties are purely clerical or ministerial.[17]

It is said that at common law a testator could appoint an infant to be executor, and that he could act as such when he was seventeen years of age; but it is probably everywhere the law in the United States that an executor, as well as an administrator or trustee by appointment of court, must be of full age. The requirement which every-

14—*Post*, § 38.

15—*Post*, § 151.

16—2 Bl. Com. 497; 4 Kent's Com. 405; Davis v. Baugh, 1 Sneed (Tenn.) 477; Major v. Hunt, 64 S. C. 97.

17—The distinction between the two classes of offices is well shown by a comparison of **Moore v. Graves, 3 N. H. 408**, with Golding's Petition, 57 N. H. 146, 24 Am. Rep. 66.

Offices where judgment, discretion and experience are essentially necessary to the proper discharge of the duties they impose are not to be intrusted to the hands of infants. But they may hold offices which are merely ministerial and which require nothing more than skill and diligence." Moore v. Graves, 3 N. H. 408.

See also Re Dewey, 11 Pick. (Mass.) 265, where a minor was held capable of being clerk of a militia company; Jainesville R. Co. v. Fisher, 109 N. C. 1, 13 L. R. A. 721 (deputy sheriff); and United States v. Bixby, 9 Fed. 78 (notary public).

where exists that such trustees should give bond for the proper performance of their trust would of itself render infants incapable of holding such trusts.[18]

An infant may be authorized by an adult to act as his agent; and as such agent may make contracts or do other acts which will bind his principal.[19]

An infant cannot change his own legal domicil.[20]

§ 3. The contracts of infants. The older common law attemped to discriminate between different classes of contracts, holding that such contracts as were clearly disadvantageous to an infant, such as penal bonds or contracts of suretyship for another, were void; such as were clearly beneficial to the infant were valid and binding, such as the receipt of a gift, or the purchase of necessaries; and such

18—"All persons are capable of being executors that are capable of making wills, and many others besides, as *femes-covert* and infants; nay, even infants unborn or *en ventre sa mère*, may be made executors. But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other *durante minore aetate.*" 2 Bl. Com. 503. See also 2 Kent's Com. 242.

The above statement that an infant *en ventre sa mère* may be made an executor is repeated in an exaggerated and evidently absurd form, viz., that he may be an executor, in Thelluson v. Woodford, 4 Ves. Jr. 227, quoted *ante*, note 4, and in Swift v. Duffield, 5 Serg. and R. (Pa.) 38. It evidently means nothing more than that a testator when drafting his will might designate as his executor a child still unborn; his ability to act as such would depend upon his capacity when the will came to be executed, which might be years later.

As to the modern law, see 2 Kent's Com. 242, note f; Clark v. Patterson, 214 Ill. 533, 105 Am St. Rep. 127; Kidd v. Bates, 120 Ala. 79, 74 Am. St. Rep 17, 41 L. R. A. 154; Bailey v. Miller, 5 Ired. L. (N. C.) 444, 44 Am. Dec. 47.

As to the inability of infants to be appointed administrators, see Davis v. Miller, 106 Ala. 154; Carow v. Mowatt, 2 Edw. Ch. (N. Y.) 57; Wallis v. Wallis, 69 N. C. 78.

19—Lyon v. Kent, 45 Ala. 656; Des Moines Ins. Co. v. McIntire, 99 Iowa 50; Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; Kanevsky v. N. Y. O. & W. R. Co., 53 Misc. (N. Y.) 564.

But he cannot execute a power coupled with the beneficial interest. Thompson v. Lyon, 20 Mo. 155.

20—Sudler v. Sudler, 121 Md. 46, 49 L. R. A. (N. S.) 860 and note.

as could not be clearly classified as either harmful or beneficial were voidable at the option of the infant.[21]

But these rules have ceased to be applied. It is recognized that the court cannot say that any contract is necessarily harmful, or necessarily beneficial; and it is left for the infant himself to determine the question and to avoid his contract if it is injurious to him; the general rule therefore applies to all contracts (except those which are legally binding upon him) that they are voidable and not void.[22]

§ 4. **What contracts are binding upon the infant.** Let us first then consider what contracts constitute an exception to the general law, and are binding upon the infant although he may desire to avoid them.

First, such contracts as he could be compelled by law to make are binding upon him if he voluntarily makes them. If, for instance, he has received payment of a mortgage, his release of the mortgage title, which he might be compelled by law to give, is valid when made voluntarily; so also, if

21—2 Kent Com. 234-6; Keane v. Boycott, 2 H. P. Bl. 511 (1795); Tucker v. Moreland, 10 Pet. (U. S.) 58; U. S. v. Brainbridge, 1. Mason (U. S.) 71, 82; Green v. Wilding, 59 Iowa 679, 44 Am. Rep. 696; Vent v Osgood, 19 Pick. (Mass.) 572; Wheaton v. East, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; Fonda v. Van Horen, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Nashville R. Co. v. Elliott, 1 Coldw. (Tenn.) 611, 78 Am. Dec. 506.

22—**Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209;** Zouch v. Parsons, 3 Burr. 1794; Weaver v. Jones, 24 Ala. 420; Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229: Reed v. Batchelder, 1 Metc. (Mass.) 559; Coursalle v. Weyerhauser, 69 Minn. 328; Englebert v. Troxell, 40 Nebr. 195, 42 Am. St. 665, 26 L. R. A. 177; Bool v. Mix, 17 Wend (N. Y.) 119, 31 Am. Dec. 285; Union Central Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 81 Am. St. Rep. 644, 53 L. R. A. 462; Jones v. Valentine, 122 Wisc. 318; Millsaps v. Estes, 137 N. C. 535, 107 Am. St. Rep. 496, 70 L. R. A. 170.

See the statement of the confusion in the use of the terms 'void' and 'voidable' in State v. Richmond, 26 N. H. 237, and in Person v. Chase, 37 Vt. 647, 88 Am. Dec. 630.

The entire subject of the "Contracts of Infants" is discussed in a 150-page note, with copious citations of authorities, in 18 Am. St. Rep. 573-724.

he has received property in trust, his acts in the due performance of the trust will be binding upon him; and his purchases made for the necessary support of his wife or children, or other persons whom he may have been legally ordered to support, are valid.[23]

Secondly: since the law expressly permits infants to enter into certain relations, the contracts by which such status is formed are legal. The most frequent case of this kind is the contract of marriage, which by the statutes may be formed at an age below that of majority. But this does not include a contract for a future marriage, the contract of engagement or betrothal as it is called.[24] Military service is also permitted to infants, and by the early laws of our old states apprenticeship was a status defined by law for the training of infants; it follows that the contracts of enlistment, and of apprenticeship, made in accordance with the special requirements of the statutes, are valid and enforceable.[25]

23—2 Kent's Com. 242; Zouch v. Parsons, 3 Burr. 1794; Tucker v. Moreland, 10 Pet. (U. S.) 58, 67; Elliott v. Horn, 10 Ala. 348, 44 Am. Dec. 488; Nordholt v. Nordholt, 87 Cal. 552, 22 A. S. R. 268; Garvin v. Burton, 8 Ind. 69; McCall v. Parker, 13 Metc. (Mass.) 372, 46 Am. Dec. 735; People v. Moores, 4 Denio (N. Y.) 518, 47 Am. Dec. 272.

In Burton v. Anthony, 46 Oreg. 47, 114 Am. St. Rep. 847, it was held that one who had loaned money to an infant to redeem his real estate from foreclosure sale, on his promise that the borrower should have all the rights of the foreclosing mortgagee, could not enforce the promise or claim a lien against the property. The soundness of this may well be doubted.

24—2 Kent's Com. 243. See *post*, § 38.

As to contracts for future marriage, see Cannon v. Alsbury, 1 A. K. Marsh (Ky.) 76, 10 Am. Dec. 709; Hunt v. Peake, 5 Cowen (N. Y.) 475, 15 Am. Dec. 475; Hamilton v. Lomax, 26 Barb. (N. Y.) 615; Rush v. Wick, 31 Ohio St. 521, 27 Am. Rep. 523; Wells v. Hardy, 21 Tex. Civ. Ap. 454.

25—As to enlistment, see Re Morrissey, 137 U. S. 157; Hoskins v. Dickerson, 239 Fed. 275, Ann. Cas. 1917 C 776 and note, L. R. A. (N. S.) 1917 D 1056 and note; Acker v. Bell, 62 Fla. 108, Am. Cas. 1913 C 1269 and note, 39 L. R. A. (N. S.) 454 and note; Re Dewey, 11 Pick. (Mass.) 265.

As to apprenticeship, Pardey v. Am. Ship Windlass Co. 20 R. I. 147, 78 Am. St. Rep. 844; *contra*,

Thirdly: the most frequent class of contracts enforceable against an infant are those for necessaries, but this topic requires more extended consideration.

§ 5. **Contracts of the infant for necessaries.** In order to make the contract of an infant enforceable under this head, the contract must be for the direct procurement of necessaries. In applying this test the wealth or poverty of the infant, and the usual standard of life of the social circle in which he moves, are of some weight; that is to say, a youth of large means and high social position might be held capable of purchasing articles which are in their nature necessaries, although the particular articles were of an expensive or luxurious character. But articles of mere ornament, fashion or luxury are never admissible.[26]

Of course necessaries include food and clothing, medical and dental care, and proper education in view of the infant's means and prospects.[27]

Clark v. Goddard, 39 Ala. 164, 84 Am. Dec. 777.

26—"From the earliest time down to the present, the word 'necessaries' is not confined in its strict sense to such articles as are necessary to support life, but extended to articles fit to maintain the particular person in the state, situation and degree in which he is; and therefore we must not take the word 'necessaries' in its unqualified sense. * * * All such article as are purely ornamental are to be rejected as they cannot be requisite for any one." Baron Parke in Peters v. Fleming, 6 Mees. & W. 46.

"The practical meaning of the term has always been in some measure relative, having reference as well to what may be called the conventional necessities of others in the same walk of life with the infant as to his own pecuniary conditions and circumstances." Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537.

It was held in the leading case of Ryder v. Wombwell, L. R. 4 Exch. 32, Thayer's Cases on Evidence, 2nd ed., 151, that a pair of sleeve buttons made of crystals set in gold and ornamented with rubies and diamonds, and a silver goblet intended as a present for a sporting patron, where "no evidence was given of anything peculiar in the defendant's statement rendering it exceptionally necessary for him to have such articles," were so clearly not necessaries that the judge should have taken the question from the jury by ordering a nonsuit.

27—"An infant may bind himself to pay for his necessary meat,

Legal services may sometimes be a necessity when they are required for his reasonable defense, or even in the necessary assertion of his personal rights.[28]

drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction whereby he may profit himself afterwards." Co. Litt. 172a.

"Those things, and those only, are properly to be deemed necessaries which pertain to the becoming and suitable maintenance, support, clothing, health, education and appearance of the infant according to his condition and rank in life, the employment or pursuit in which he is engaged, and the circumstances in which he may be placed as to profession or position." N. H. Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345.

Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537, holds that a common school education is a necessary, but not a collegiate education. In 1844 a college education was more exceptional than now, and this distinction would probably not be strictly adhered to at the present time. It would be rather a question of the actual suitability of a collegiate education for the infant in question in view of both his means and his intellectual capacity.

It has been held in England that where the infant was a professional billiard player instruction in the game from a distinguished expert might be a "necessary." Roberts v. Gray, L. R. (1913) 1 K. B. 520.

As to education as a necessary see also Cory v. Cook, 24 R. I. 421; Turner v. Gaither, 83 N. C. 537, 35 Am. Rep. 674 (medical education); Mauldin v. Southern University, 126 Ga. 681, 8 Ann. Cas. 130 (a course in stenography); International Text Book Co. v. Doran, 80 Conn. 307; International Text Book Co. v. Connelly, 206 N. Y. 188, 42 L. R. A. (N. S.) 1115 and note; and Nielson v. International Text Book Co., 106 Me. 174, 20 Ann. Cas. 591 (correspondence school instruction).

See also Strong v. Foote, 42 Conn. 203 (dental work); Pyne v. Wood, 145 Mass. 558 (a bicycle).

28—**Crafts v. Carr, 24 R. I. 397, 96 Am. St. Rep. 721, 60 L. R. A. 128,** an action for legal services in a successful suit to recover damages for an indecent assault on a girl; Munson v Washband, 31 Conn. 303, 83 Am. Dec. 151, a similar case. Barker v. Hibbard, 54 N. H. 539, 20 Am. Rep. 160, and Askey v. Williams, 74 Tex. 294, 5 L. R. A. 176, were for legal services in defense of the defendant, one against a bastardy prosecution, the other against a prosecution for larceny.

Legal services for the protection of an infant's property interests do not fall within the class of necessaries. **Grissom v. Beidleman, 35 Okla. 343, Ann. Cas. 1914 D 599 and note, 44 L. R. A. (N. S.) 411 and note;** McIsaac v. Adams, 190 Mass. 117, 112 Am. St. Rep. 321, 5 Ann. Cas. 729; Engle-

Money is not in itself a "necessary"; and the borrowing of money is never a valid contract binding on an infant at law. But if the money borrowed was actually expended for necessaries, the lender may, by a court acting upon equitable principles, be subrogated to the rights of the merchant who supplied the necessary articles, and be permitted to recover the amount of his loan.[29]

Undoubtedly, with the increase of the general standard of living and expenditure, the rule as to what would be necessaries for an infant tends to grow more liberal, and the older cases to lose their value as precedents.

Not only must the articles be of such a kind as to be necessaries, but the infant must in fact be in need of them. If he is already supplied, or if he is living with his parents who are willing to supply his requirements, his contracts for such articles will not be binding.[30]

bert v. Troxell, 40 Nebr. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177.

And see, *post*, § 6.

But in Owens v. Gunther, 75 Ark. 37, 5 Ann. Cas. 130, and in Searcy v. Hunter, 81 Tex. 644, 26 Am. St. Rep. 837, this distinction is denied, and a minor held liable for legal services which were necessary for the protection of his property interests.

In Epperson v. Nugent, 57 Miss. 45, 34 Am. Rep. 434, it was held, where an infant who had no guardian employed counsel by whose services an estate was secured, "that the reasonable fees of such counsel should be paid out of the estate thus obtained."

The fees to be paid to counsel in such case are not to be fixed by contract with the infant, but by the court in which the litigation was held. Connor v. Ashley, 57 S. C. 305.

29—**Kilgore v. Rich, 83 Me. 305, 23 Am. St. Rep. 780, 12 L. R. A. 859;** Swift v. Bennett, 10 Cush. (Mass.) 436; Bradley v. Pratt, 23 Vt. 378; Leslie v. Sheill, (1914) 3 K. B. 607, Ann. Cas. 1916 C 992 and note, 6 Brit. Rul. Cas. 738.

But this does not apply where the money was used for the protection of property interests and not of personal rights. Burton v. Anthony, 46 Ore. 47, 114 Am. St. Rep. 847, stated, *ante*, note 23.

See the similar rule as to married women, *post*, § 79.

30—Nash v. Inman (1908) 2 K. B. 1, 14 Ann. Cas. 682; Johnstone v. Marks, L. R. 19 Q. B. Div. 509; Mauldin v. Southern University, 126 Ga. 681, 8 Ann. Cas. 130; Decell v. Lewenthall, 57 Miss. 331, 34 Am. Rep. 449; Kline v. L'Amoreux, 2 Paige Ch. (N. Y.) 419, 22 Am. Dec. 652; Goodwin v. Alexander, 165 N. Y. 289, 55

§ 6. The contract must be for articles of personal necessity. The class of necessaries is confined to those required for the *personal* benefit of the infant. The law does not favor or sanction an infant going into business, and therefore any business contracts are disapproved; and if he owns any property which requires expenditures for its proper management or care, the policy of the law is that such property should be cared for and administered by a guardian. Contracts of the infant, therefore, for the rent of a store, for legal services required for the carrying on of business or protection of property interests, for the making of repairs or improvements, or for the procurement of insurance, are not valid if made by the infant himself without the intervention of a guardian.[31]

L. R. A. 781; Guthrie v. Murphy, 4 Watts (Pa.) 80, 28 Am. Dec. 681; Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Hall v. Connolly, 3 McC. L. (S. C.) 6, 15 Am. Dec. 612.

The quantity furnished by the defendant, as well as the kind of goods, may be considered in determining where the goods were necessaries; as in Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542, where the plaintiff sold a minor twelve coats, seventeen vests, twenty-three pantaloons, three bowie knives, sixteen pen-knives, eight whips, thirty-nine hankerchiefs and five canes, besides other funishings, in sixteen months.

Where a minor was living with his father, who supported him to the extent of his ability a physician, who attended him without notifying either him or the father that he intended to look to the boy for his pay, cannot sue the minor because the father proved unable to pay him. Hoyt v. Casey, 114 Mass. 397, 19 Am. Rep. 371.

31—**Tupper v Caldwell, 12 Metc. (Mass.) 559, 46 Am. Dec. 704;** Ryan v. Smith, 165 Mass. 303; McCarthy v. Carter, 49 Ill. 58, 95 Am. Dec. 572; House v. Alexander, 105 Ind. 109, 55 Am. Rep. 189; Decell v. Lewenthall, 57 Miss. 331, 34 Am. Rep. 449; N. H. Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345; Freeman v. Bridges, 4 Jones L. (49 N. C.) 1, 67 Am. Dec. 258; Burton v. Anthony, 46 Ore. 47, 114 Am. St. Rep. 847; Phillips v. Lloyd, 18 R. I. 99; Rainwater v. Dunham, 2 Nott & McC. (S. C.) 524, 19 Am. Dec. 637; Grace v. Hall, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; Wallace v. Leroy, 57 W. Va. 263, 110 Am. St. Rep. 777; Covault v. Nevitt, 157 Wis. 113, Ann. Cas. 1916 A 959, 51 L. R. A. (N. S.) 1092.

As to legal services for the pro-

But the personal benefit of the infant includes that of his wife and children.

§ 7. The contract itself is not enforceable. The important qualification exists to the liability of the infant upon a contract for necessaries that the contract itself is not enforceable. The infant is merely compellable to pay a reasonable price for the necessaries that have been furnished.

He is liable for a *quantum meruit* on the implied contract resulting from his receipt and use of the necessary articles, but not on his express contract.[32]

He is not bound therefore by an account stated, nor by his note or bill of exchange for the agreed price.[33]

And he is not bound by a contract for future necessaries which he rescinds before they are furnished; or when only a part have been furnished for which he has paid.[34]

§ 8. Other contracts are voidable. Contracts not within the exceptions above stated are voidable.[35]

tection of property rights, see *ante*, note 28.

32—**Gregory v. Lee, 64 Conn. 407, 25 L. R. A. 16;** Wallin v. Highland Park, 127 Iowa 131, 4 Ann. Cas. 421; Trainer v. Trumbull, 141 Mass. 527. See also the opinion of Moulton, J., in Nash v. Inman (1908) 2 K. B 1, 14 Ann. Cas. 682.

It is held in Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 564, that an infant who has contracted for necessaries is liable on "such a species of express contract, and in such a form of action, as leaves the nature, terms and consideration of the contract open to inquiry, and then only by such contract as shall appear at the time to have been fair, reasonable and beneficial to the minor." With this agrees Bradley v. Pratt, 23 Vt. 387.

In Ayres v. Burns, 87 Ind. 245 44 Am. Rep. 759, an infant was held not liable to reimburse one who had become surety on the infant's note given for necessaries, and had been compelled to pay the note. Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746, decides the opposite way on exactly the same facts.

33—Earle v. Reed, 10 Metc. (Mass.) 387; Swasey v. Vanderheyden, 10 Johns. (N. Y.) 33. See also the preceding note.

34—Gregory v. Lee, 64 Conn. 407, 25 L. R. A. 16; Wallin v. Highland Park, 127 Iowa 131, 4 Ann. Cas. 421; Jones v. Valentine, 122 Wisc. 318.

35—Mason v. Wright, 13 Metc. (Mass.) 306; Person v. Chase, 37 Vt. 647, 88 Am. Dec. 630; Tetrow

It makes no difference that the infant has been emancipated by his father, or is married,[36] or is engaged in business,[37] or is nearly twenty-one years of age and of actual business capacity.[38]

Nor does it make the contract enforceable against the infant that his father united with him in making it,[39] or that his guardian assented to it and made payments on it during the infant's minority.[40]

Nor does it make any difference that the other party supposed the infant to be of full age,[41] nor even that the infant when he made the contract declared that he was of full age.[42]

v. Wiseman, 40 Ind. 148. See also *ante*, note 22.

36—Tenn. Mfg. Co. v. James, 91 Tenn. 158, 30 Am. St. Rep. 865, 15 L. R. A. 211; Harrod v. Meyers, 21 Ark. 592, 76 Am. Dec. 409; Youse v. Norcross, 12 Mo. 549, 51 Am. Dec. 175.

37—Tupper v Caldwell, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; Ryan v. Smith, 162 Mass. 303; Folds v. Allardt, 35 Minn. 488; Studwell v. Shafter, 54 N. Y. 249.

Contra, in Georgia, Iowa and Kansas, by statute. Code of Georgia, § 3650; Ullmer v. Fitzgerald, 106 Ga. 815, 32 S. E. 869; Code of Iowa, § 3190; Beickler v. Guenther, 121 Iowa 519; G. S. Kans., 1905, § 4376.

38—"A minor who has nearly attained his majority may be as able, in fact, to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years." McCarthy v. Carter, 49 Ill. 53, 95 Am. Dec. 572. This principle is also illustrated by most or all of the cases in the following notes.

39—Cain v. Garner, 169 Ky. 633, Ann. Cas. 1918 B 824 and note.

40—Reynolds v. Garber-Buick Co., 183 Mich. 157, L. R. A. 1015 C 362 and note.

41—Baker v. Stone, 136 Mass. 405; Alvey v. Reed, 115 Ind. 148, 7 Am. St. Rep. 148.

This rule has been changed by statute in Iowa and Kansas. Code of Iowa, § 3190; G. S. Kans. 1905, § 4376.

42—Sims v. Everhardt, 102 U. S. 300; Wieland v. Kobick, 100 Ill. 16, 51 Am. Rep. 676; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Conrad v. Lane, 26 Minn. 289, 37 Am. Rep. 412; Ridgeway v. Herbert, 150 Mo. 506, 73 Am. St. Rep. 464; Burley v. Russel, 10 N. H. 184, 34 Am. Dec. 146; Conroe v. Birdsall, 1 Johns. Cas. (N. Y.)

But the contracts are voidable only and not void; that is, neither the adult contracting party nor any third person can attack their validity, and the law will enforce them unless the infant by some act of avoidance asserts his privilege.

Even such business contracts as deeds, leases, notes, endorsements, are not absolutely void; and if an adult and an infant form a partnership, the partnership will be a fact, the other partners will be bound by the partnership liabili-

127, 1 Am. Dec. 105; N. Y. Bldg. & Loan Co. v. Fisher, 23 App. Div. (N. Y.) 363, 48 N. Y. Supp. 152; Loan Asso. v. Black, 119 N. C. 323; Keen v. Coleman, 39 Pa. St. 297, 80 Am. Dec. 524; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678; Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 4 Ann. Cas. 532 and note.

Contra, Commander v. Brazile, 88 Miss. 668, 9 L. R. A. (N. S.) 1117; Damron v. Com., 110 Ky. 268, 96 Am. St. Rep. 453; Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681.

But in equity an infant or former infant has been held to be estopped by false representations that he was of age, made when the contract was entered into, if to permit the defense of infancy to avail would operate a fraud. Hayes v. Parker, 41 N. J. Eq. 631; Ferguson v. Bobo, 54 Miss. 121; International Land Co. v. Marshall, 22 Okla. 693, 19 L. R. A. (N. S.) 1056.

"At law it is conclusively presumed that a person within the age of twenty-one is unfit for business, and that every contract into which he enters is to his disadvantage, and that he is incapable of fraudulent acts which will estop him from interposing the shield of infancy against its enforcement. In equity, however, this rigid rule has its exceptions. Equity will regard the circumstances surrounding the transaction, the appearance of the minor, his intelligence, the character of his representation, the advantage he has gained by the fradulent representations, and the disadvantage to which the person deceived has been put by them, in determining whether he should be permitted to invoke successfully the plea of infancy." Hayes v. Parker, *supra*.

But this distinction between law and equity is denied, and the infant held not liable in such a case in Leslie v. Sheill, (1914) 3 K. B. 607, Ann. Cas. 1916 C 992, 6 Brit. Rul. Cas. 738.

"The incapacity of infants to enter into binding contracts is the same in equity as at law, and the same rules of public policy govern and the same consequences attach." Watson v. Ruderman, 79 Conn. 687.

As to the infant's liability in an action of tort for fraud in misrepresenting his age, see *post*, § 18.

ties, persons contracting with the firm will be liable to it, and the only defect attaching to the partnership is that the infant himself can avoid liability by his plea of infancy.[43]

§ 9. **The avoidance of the contract.** 1. *Who can Avoid.* It follows from what was said above that the privilege of avoidance is personal to the infant; if the infant is still living no one but himself or his guardian[44] can avoid the contract, but if he is dead his heirs or personal representatives may do so.[45] The other party to the contract is bound there-

43—**Whitney v. Dutch 14 Mass. 457, 7 Am. Dec. 229;** Pelletier v. Couture, 148 Mass. 269, 1 L. R. A. 863; Shirk v. Schultz, 113 Ind. 578; Folds v. Allardt, 35 Minn. 488; Gordon v. Miller, 111 Mo. Ap. 342; Miller v. Sims, 2 Hill (S. C.) 479; Yates v. Lyon, 61 N. Y. 344; Continental Nat. Bk. v. Strauss, 137 N. Y. 148.

"There can be no question but that an infant may become interested in business as a general partner. * * * If the general partner, or one of the general partners, is a minor, he is nevertheless responsible for all partnership engagements, and will be unless and until he elects to set up the personal plea of infancy. But that he will do so is not to be presumed. To the contrary is the presumption. It would be an immoral presumption to entertain that a person who enters into engagements with others will resort to the plea of infancy to avoid them thereafter. The law has, with a great solicitude for the interests of infants, thrown about them a protecting arm, and accords to them the privilege to plead their incapacity, if they desire to escape from the compliance with or the result of some contract. It does not and cannot perhaps, unfortunately, make a distinction in favor of those who honestly seek to be relieved of some advantages taken of them in their minority as against those who used the plea of infancy to take an advantage of others. The law does not compel them to set up the plea, any more than it stamps their engagements as void." Continental Nat. Bk. v. Strauss, *supra.*

44—Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Benson v. Tucker, 212 Mass. 60, 41 L. R. A. (N. S.) 1219; Stafford v. Roof, 9 Cow (N. Y.) 626.

Contra, Dunton v. Brown, 31 Mich. 182.

45—Keane v. Boycott, 2 H. Bl. 511; Union Cent. Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 81 Am. St. Rep. 644, 53 L. R. A. 462.

The infant's administrator, Person v. Chase, 37 Vt. 647, 85 Am. Dec. 630; Smith v. Mayo, 9 Mass. 62 6 Am. Dec. 28; Harvey v. Briggs, 68 Miss. 60; or his heirs, Sayles v. Christie, 187 Ill. 420; Harris v. Ross, 86 Mo. 89, 56 Am.

by, until the infant has exercised his right to avoid.[46]

For instance in a contract of service, while the infant employee may quit the service at any time without liability for damages therefor, the adult employer is bound as if both parties were of age.[47] So also in a contract between

Rep. 411; may disaffirm his contract after his death, if there has been no sufficient ratification. His privies in estate by deed or will cannot disaffirm. Harris v. Ross, 112 Ind. 314; Riley v. Dillon, 148 Ala. 283; Bozeman v. Browning, 31 Ark. 364. But the phrase "privies in estate" in this connection does not include one to whom the infant, after coming of age, had made a deed in derogation of his deed made in infancy; and such grantee may avoid the infant's deed. Breckenbridge v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71. His creditors cannot avoid his contract; Kendall v. Laurence, 22 Pick. (Mass.) 540; nor can a subsequent lienor; Baldwin v. Rosier, 1 McCrary (U. S.) 384.

In Watson v. Ruderman, 79 Conn. 687, it was held that where an infant had bought land and given back a mortgage for the purchase price, a demand by the mortgagee for a judgment which should either foreclose the mortgage or rescind the entire transaction could not be granted, since the infant is entitled to exercise his option at majority, and the court cannot exercise it in his place.

But it is said in Hobbs v. Nashville R. Co., 122 Ala. 602, 82 Am. St. Rep. 103, that when the rights of the parties came before a court of equity, "the court may elect for the infant with a view to his interest but it will so decree as not to allow him the unfair advantage of avoiding the transaction while retaining its fruits."

It was held in O'Rourke v. Hancock Mut. Life Ins. Co., 23 R. I. 457, 91 Am. St. Rep. 643, 57 L. R. A. 496, that the beneficiary of a life insurance policy might set up the infancy of the assured in reply to a defense based upon a statement of the assured in the application, which by the terms of the policy was a warranty. This decision seems very questionable; the warranties of the assured are one side of the contract, and the agreement by the company to pay the loss is the other; it is not in accordance with principle to hold that the plaintiff can repudiate one side of a bilaterial contract and enforce the other. Would it not be as defensible to say that the infant might refuse to pay his premiums, and still hold the company liable in case of a loss?

46—Patterson v. Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178; Nashville R. Co. v. Elliott, 1 Coldw. (Tenn.) 611, 78 Am. Dec. 306.

47—Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Widrig v. Taggart, 51 Mich. 103; Dearden v. Adams, 19 R. I. 217.

an adult and an infant for future marriage, the contract is binding upon the adult unless it is repudiated by the infant.[48]

In one respect the adult party to such a contract has been relieved from possible injustice; it has been held that a court of equity will not decree specific performance of a contract against an adult, when the agreement of the other party, who is an infant, is still unperformed and may be repudiated by him.[49]

§ 10. 2. *When the infant may avoid his contract.* A deed of land executed by an infant cannot be finally and effectively avoided until he is of age; but he may during minority re-enter and take the rents and profits, leaving the final determination of the title to the land to be settled when he arrives at full age.[50]

48—Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Warwick v. Cooper, 5 Sneed (Tenn.) 659; Rush v. Wick, 31 Ohio St. 521, 27 Am. Rep. 523.

49—Flight v. Bolland, 4 Russ. Ch. 298; Pomeroy on Spec. Perf., 2nd ed., § 172, note 1.

But if the infant has already performed his part of the contract, he can enforce specific performance by the adult party. Asberry v. Mitchell, 121 Va. 276, L. R. A. 1918 A 785 and note.

50—Sims v. Everhardt, 102 U. S. 300; Singer Mfg. Co. v. Lamb, 81 Mo. 221; McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.

"There is some diversity in the books as to the proper time of avoiding the deed of an infant, some cases intimating that it cannot be done till the infant arrives of age, some that the disaffirmance should be before that time, and others holding the time to be immaterial, so that disavowing the deed shall not be so long delayed as to work its ratification. Of course when a former deed is to be invalidated by a subsequent deed to another person, it must be done after full age, for the same want of capacity that makes the first revocable would annul the second deed; but the act of infancy can be revoked by entering upon the land and taking the profits while an infant." Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409.

Kent says (II:237): "The infant's privilege of avoiding acts which are matters of record, as fines, recoveries and recognizances, is much more limited in point of time than his privilege of avoiding matters *en pais*. The former must be avoided by him

But other contracts he may avoid either during his infancy or after he comes of age.[51] The question how soon after he comes of age he must avoid his contract, in order to avoid the implication of ratification by inaction, is discussed hereafter under the head of "Implied Ratification," § 17.

§ 11. 3. *How he may avoid it.* If the act in question be a deed, or a matter of judicial record, as in the case of the common law fine or recovery, the ancient law was that it could be avoided only by an act of equal solemnity;[52] while it might be ratified in a less formal manner by any act showing an intention to let the transaction stand.

The modern law is not so much accustomed as was the ancient law to measure degrees of solemnity, or to estimate

by writ of error, or *audita querela*, during his minority, when his nonage can be tried by the court by inspection; but deeds, writings, and parol contracts may be avoided during infancy or after he is of age, by his dissent, entry, suit, or plea, as the case may require."

51—Re McFerren, 184 Ala. 223, Ann. Cas. 1915 B 672, 47 L. R. A. (N. S.) 543; Riley v. Mallory, 33 Conn. 201; Rice v. Boyer, 108 Ind. 472, 55 Am. Rep. 53; Shipley v. Smith, 162 Ind. 526; Adams v. Beall, 67 Md. 53, 1 Am. St. Rep. 379; Willis v. Twambly, 13 Mass. 204; Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 174.

Ergo, if an infant procure a policy of life insurance, and afterward during infancy surrender it for the cash surrender value, the latter transaction operates as a rescission of the first, and is final. Pippen v. Mut. Ben. Life Ins. Co., 130 N. C. 23, 57 L. R. A. 505.

But in Michigan it is held that he cannot avoid his contract during infancy, and therefore one who had accepted a sum in settlement of personal injuries could not later, before majority, repudiate the settlement and sue for the injury. Lansing v. Mich. Cen. R. Co. 126 Mich. 663, 85 Am. St. Rep. This is said in the note, 11 L. R. A. (N. S.) 691, to be the only case supporting that proposition.

If during infancy an infant avoid a purchase which he had made, and surrender up the property to the seller, intending to give up all his interest in it, the avoidance is final; and he cannot afterwards affirm the purchase and reclaim the property. Edgerton v. Wolf, 6 Gray (Mass.) 453.

52—**Tucker v. Moreland, 10 Pet. (U. S.) 58, 72;** Jackson v. Carpenter, 11 Johns (N. Y.) 539; Jackson v. Burchin, 14 Johns, (N. Y.) 124.

the binding quality of contracts by the ceremonial accompanying them; but it is still true, and the rule is one of common sense, that the disaffirmance of a deed, which really operates as a reconveyance of the land, and changes a recorded real estate title, must be done in such definite and unmistakable manner as not to leave the title in doubt. A new deed to another party,[53] a formal entry and retaking of possession,[54] the bringing of an action for the recovery of the land,[55] or any other open and definite disavowal of the contract,[56] is sufficient.

53—Tucker v. Moreland, 10 Pet. (U. S.) 58, 72; Beauchamp v. Bertig, 90 Ark. 351, 23 L. R. A. (N. S.) 659; Ison v. Cornett, 116 Ky. 92; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569; Cresinger v. Welch, 15 Ohio 156, 45 Am. Dec. 565; Tolar v. Marion Co. Lumber Co., 93 S. C. 274, Ann. Cas. 1914 D 845 and note; Mustard v. Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

But the second deed must be evidently inconsistent with and show an intention to revoke the first; *ergo*, a quit claim deed given after the grantor has reached the age of majority does not constitute an avoidance of a mortgage executed to a different person during minority. Singer Mfg. Co. v. Lamb, 81 Mo. 221; Shreeves v. Caldwell, 135 Mich. 323, 3 Ann. Cas. 592.

54—Tucker v. Moreland, 10 Pet. (U. S.) 58, 73; Worchester v. Eaton, 13 Mass. 371, 375.

55—Englebert v. Troxell, 40 Nebr. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569; Goodnow v. Empire Lumber Co. 31 Minn. 468, 47 Am. Rep. 798; Phillips v. Green, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; Lanning v. Brown, 84 Ohio St. 385, Ann. Cas. 1912 C 772.

56—"Some distinct and positive act, leaving no room for doubt as to the intention of the party." McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.

"While a conveyance of the same land to some one else after majority, and in disregard of the former deed, is a disaffirmance of the former deed made during infancy, yet the doctrine that the act of disaffirmance must be by an instrument of equal solemnity with the instrument sought to be avoided no longer obtains. * * * The disaffirmance may be by entry upon the land, by a written notice of disaffirmance, by a subsequent conveyance, or by any other equally emphatic act declaratory of an intention to disaffirm." Shroyer v. Pittenger, 31 Ind. App. 158.

"Where the possession remains with the grantor until he comes of lawful age, all he would have to do would be to disavow the title

As to contracts *in pais*, any definite act of the infant, or of the former infant after he has come of age, which declares his intention to repudiate the contract and assert his privilege of infancy, is sufficient; as, if the contract were a purchase of property, a return of the property and a demand for the consideration;[57] if it were a sale or gift of property, the retaking or demanding the property;[58] if it were a contract to do certain things in the future, notice that the infant claims his privilege of infancy, and will no longer adhere to the contract.[59]

It is not necessary that there should have been any express repudiation of the contract before suit; the assertion of privilege made by the pleadings in a suit is itself a sufficient avoidance.[60]

§ 12. **The restoration of the consideration.** In cases where the infant seeks to avoid a contract, and is not able to restore the consideration which he received, a situation of difficulty occurs which has led to some uncertainty and conflict in the decisions. But it is now well settled that it is not an essential condition to an infant's right to rescind that the other party should be placed *in statu quo*. To make

set up under the deed, and hold the title adversely to all the world. * * * Any act, under such circumstances, on the part of the grantor, by which he shows to the world after he comes of age that he does not intend to be bound by his deed, is all that the law requires to effect the revocation." Slaughter v. Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

57—Riley v. Mallory, 33 Conn. 201; House v. Alexander, 105 Ind. 109, 55 Am. Rep. 189; Willis v. Twambly, 13 Mass. 204; McCarthy v. Henderson, 38 Mass. 310.

But where both parties to a sale were infants, and the buyer rescinded the contract and demanded back the price, it was held that the seller, having already spent the money, could plead infancy and avoid the implied contract for the return of the money. Drude v. Curtis, 183 Mass. 317, 62 L. R. A. 755.

58—Murray v. McKenzie, 23 Ont. L. Rep. 287, 21 Ann. Cas. 968.

59—Gregory v. Lee, 64 Conn. 407, 25 L. R. A. 16; Shroyer v. Pittenger, 31 Ind. App. 158.

60—Indiana Union Traction Co. v. Maher, 176 Ind. 289, Ann. Cas. 1914 A 994; Wallace v. Leroy, 57 W. Va. 263, 110 Am. St. Rep. 777.

that a condition to the infant's right to avoid would substantially overthrow the protection given to the infant. If, therefore, the infant has expended or wasted the consideration received by him, so that he cannot restore it, or if it were a mere temporary benefit which has ceased to exist, this does not prevent his right to avoid the contract and recover his property which the other party holds. But if the infant still has in his possession the precise property acquired by the contract, or any part of it, he must restore so much to the other party.[61]

The latter part of this rule necessarily results from the doctrine hereafter stated that the rescission is an entirety and avoids both sides of the contract.

§ 13. As to beneficial executed contracts. It is evident that the rule that one may rescind a contract which he made in infancy, and demand back the consideration which passed from him to the other party, while he has received an equivalent benefit from the consideration which the other party rendered to him, which he cannot restore because it no

61—**Englebert v. Troxell, 40 Nebr. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177 and note;** MacGreal v. Taylor, 167 U. S. 688; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732; Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 414; Putnal v. Walker, 61 Fla. 720, 36 L. R. A. (N. S.) 33; Wuller v. Chuse Grocery Co., 241 Ill. 398, 132 Am. St. Rep. 216, 28 L. R. A. (N. S.) 128; Clark v. Van Court, 100 Ind. 113, 50 Am. Rep. 774; Shipley v. Smith, 162 Ind. 526; Ison v. Cornett, 116 Ky. 92; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569 and note; Ridgeway v. Herbert, 150 Mo. 606, 73 Am. St. Rep. 464; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233; Lemmon v. Beamon, 45 Ohio St. 505; Worthy v. Jonesville Oil Mill, 77 S. C. 69, 11 L. R. A. (N. S.) 690; Mustard v. Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Wallace v. Leroy, 57 W. Va. 263, 110 Am. St. Rep. 777.

"If an infant has lost, expended or squandered the consideration during his minority, this is nothing more than what the law anticipates of him; and he cannot be required to purchase the right of reclaiming his own by still further abstractions from his estate." So. Cotton Oil Co. v. Dukes, 121 Ga. 787.

longer exists *in specie*, may sometimes work hardship and injustice to the adverse party.

Several different exceptions to the rule have been suggested, each of which had for its object to prevent the infant from using his special privilege as a means of defrauding others.

The first exception proposed was to the effect that, if an infant had voluntarily paid out money upon the contract, he could not rescind the contract and recover it back. This distinction between the effect of paying money, and giving any other consideration, is clearly illogical and is no longer recognized.[62]

A more plausible distinction is that sometimes made between a fully executed contract, which it is said cannot be rescinded without restoring the adverse party to the *status*

62—The leading case supporting this exception is Holmes v. Blogg, 8 Taunt. 508, 4 E. C. L. 189. This rests in part upon a dictum attributed to Lord Mansfield that "if an infant pays money with his own hands, without a valuable consideration for it, he can not get it back again." The same doctrine is stated in Parsons on Contracts, I, 322.

Holmes v. Blogg was, however, overruled on this point in Corpe v. Overton, 10 Bing. 252, 25 E. C. L. 121; and the American cases have denied this distinction between the effect of paying money and of delivering any other property. Ex p. McFerren, 184 Ala. 223, Ann. Cas. 1915 B 672 and note, 47 L. R. A. (N. S.) 843; Riley v. Mallory, 33 Conn. 201; Wuller v. Chuse Grocery Co., 241 Ill. 398, 132 Am. St. Rep. 216, 28 L. R. A. (N. S.) 128; House v. Alexander, 105 Ind. 109, 55 Am. Rep. 189; Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Vent v. Osgood, 19 Pick. (Mass.) 572; Medbury v. Watrous, 7 Hill (N. Y.) 110 (overruling McCoy v. Hoffman, 7 Cow. (N. Y.) 84); Shurtleff v. Millard, 12 R. I. 272, 34 Am. Rep. 640; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194.

"No court in England or this country, it is believed, would now follow Holmes v. Blogg, or pay any attention to the senseless dictum attributed to Lord Mansfield." Riley v. Mallory, 33 Conn. 208.

But the doctrine of Holmes v. Blogg is adhered to in Adams v. Beall, 67 Md. 53, 1 Am. St. Rep. 379.

The doctrine of Holmes v. Blogg, as it has been limited and refined in Hamilton v. Vaughan-Sherrin Eng. Co. (1894) 3 Ch. 589, is about equivalent to that of Breed v. Judd, *post*, note 64.

quo, and one which is partly or wholly unexecuted.[63]

63—In Connecticut this distinction was early made, and it was held that an infant cannot rescind an executed contract and recover back the property which he parted with unless he can restore the other party to his original position. Riley v. Mallory, 33 Conn. 201, affirmed in Coburn v. Raymond, 76 Conn. 484, 492, 100 Am. St. Rep. 1000.

With these cases agree Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345; Taft v. Pike, 14 Vt. 306, 39 Am. Dec. 228; Bailey v. Barnberger, 11 B. Mon. (Ky.) 113.

"A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant on becoming of age disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor, to have the contract performed. In such case the infant, or quondam infant, is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back anything he may have acquired or received under the contract. The most that can be required of him is that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one, then, on demand or suit, he can be held to account for it.

"The rule is different when the contract has been executed. Then the quondam infant, or any one asserting claim in his right, must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be decreed to him. This is the difference between asking and resisting relief. But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still *in esse,* and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so if the infant has used or consumed it during his minority." Eureka v. Edwards, 71 Ala. 248, 46 Am. Rep. 314.

But in most of the cases this distinction also is denied, except under the limitations stated in the following paragraph, with the result of serious loss sometimes befalling the adult who has ventured to deal with an infant. In Dube v. Beaudry, 150 Mass. 448, 15 Am. St. Rep. 228, 6 L. R. A. 146, an infant who had worked for the defendant under an agreement that part of his wages should be applied to pay the debt of a deceased father was allowed, after the employment ended, to recover the full value of his labor and repudiate the ap-

This exception, however, requires further qualification to avoid the doing of injustice to the infant in the effort to prevent injustice by him. If the contract when made was a fair and reasonable one, if it has been completely performed on both sides, and if by this actual performance the infant has been enriched or otherwise benefited, though he may not now retain *in specie* the precise consideration which moved to him, it is unjust for him to demand restoration of what the other party received, unless he can so restore what he himself received as to put the adverse party *in statu quo*.

This modification of the general rule, first defined by the Supreme Court of Massachusetts in 1854,[64] has been widely accepted as giving the infant full protection from injustice, while preventing him from defrauding his adversary;[65] al-

plication made to the debt. In Reynolds v. Garner-Buick Co., 183 Mich. 157, L. R. A. 1915 C 362, after buying, paying for and using two automobiles, he was allowed to return them and recover the full purchase price.

In Whitcomb v. Joslyn 51 Vt. 79, 31 Am. Rep. 778, an infant bought a wagon for $50, the vendor retaining a lien for the price. After $19 had been paid, the vendor retook it under his lien. It was then worth only $20. Although the court found that the use of the wagon was worth to the infant all that he had paid, he was held entitled to recover back the sum.

See also the cases cited in notes 65 and 66.

64—Breed v. Judd, 1 Gray (Mass.) 455.

65—Substantially the same doctrine as that of Breed v. Judd is held in Harney v. Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662; Spicer v. Earl, 41 Mich. 191, 32 Am. Rep. 152; and Taft v. Pike, 14 Vt. 405, 39 Am. Dec. 228. In accordance with this doctrine, the Minnesota court has held that, where a boy of seventeen took out a policy of endowment life insurance and kept it up by paying the premiums until he became of age, he cannot then repudiate the transaction and demand a return of his premium. **Johnson v. N. W. Mutual Life Ins. Co., 56 Minn. 365, 45 Am. St. Rep. 473, 26 L. R. A. 187.** The Massachusetts court has held in a precisely similar case that an infant can recover, and that the insurance company cannot retain the cost of carrying the insurance for the period that it has been in force. **Simpson v. Prudential Life Ins. Co., 184 Mass. 348, 100 Am. St. 560, 56 L. R. A. 741.**

Again, the New York court has held that a minor, who has bought a bicycle on installments and used

though the Massachusetts court itself seems to have wholly repudiated its own wise precedent.[66]

§ 14. 4. *The effect of his avoidance.* If the infant avoids a contract, he must avoid it as a whole; he cannot avoid so much of a contract as is to his disadvantage, and affirm so much as is advantageous to him. Thus where he receives a deed of land and mortgages it back for the purchase price, if he avoids the mortgage, the other party is entitled to have the deed treated as rescinded also.[67] And if

it for a while, cannot return it in a second-hand condition and demand a return of the payments that he has made: **Rice v. Butler, 160 N. Y. 578, 73 Am. St. Rep. 703, 47 L. R. A. 403;** while Massachusetts holds in a similar case that he can recover the installments that he paid. **Gillis v. Goodman, 180 Mass. 140, 91 Am. St. Rep. 265.**

The present English rule agrees with that of Breed v. Judd. Hamilton v. Vaughan-Sherrin Co. (1894) 3 Ch. 589.

The results that would follow from a strict enforcement without qualification of the infant's privilege are thus forcibly stated in the Minnesota opinion. "Suppose a minor engaged in agriculture should hire a man to work on his farm and pay him reasonable wages for his services. According to this rule, the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor.

Or again, suppose a man engaged in the mercantile business with a capital of $5,000 should from time to time buy $100,000 worth of goods which he sold and got his money for. According to this doctrine he could recover back the $100,000 which he had paid to the parties from whom he had bought the goods." Johnson v. N. W. Mut. Life Ins. Co., *ut supra.*

The same rule apparently would enable an infant, on arriving at majority or before, to go over all the transactions of his minority in which he has paid out money not for strict necessaries, but for fair and reasonable purchases, and institute suit for recovery of all such sums.

66—See Simpson v. Prudential Life Ins. Co. and Gillis v. Goodman cited in the preceding note. See also Morse v. Ely, 154 Mass. 458, 26 Am. St. Rep. 263, in which an infant, working by the day, had bought farm animals and hired farm services, the price of which had been deducted from his wages. Although these contracts were fairly made for reasonable prices, and were in fact beneficial to the infant, it was held that he could recover the amount so deducted. Pecacaro v. Pecacaro, 84 N. Y. Supp. 581, is a contrary decision on very similar facts.

67—Hubbard v. Cummings, 1 Greenl. (Me.) 11; Ready v. Pink-

he avoids a contract by which he purchased property, the title to the property which came into his hands by the contract, if he still retains it, revests in the seller.[68]

After the contract has been avoided the parties stand to each other as if it had never been made;[69] and the infant can reclaim any property that he may have sold or recover back any money that he may have paid subject (according to some of the cases, but not according to others) to the qualification above stated, that if he has received a fair and reasonable consideration for such property or money, of

ham, 181 Mass. 351; U. S. Investment Corp. v. Ulricson, 84 Minn. 14, 87 Am. St. Rep. 326; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569; Uecker v. Koehn, 21 Nebr. 559, 59 Am. Rep. 849; Heath v. West, 28 N. H. 101; Curtiss v. McDougal, 26 Ohio St. 66; Knaggs v. Green, 48 Wisc. 601, 33 Am. Rep. 838.

It was held in **MacGreal v. Taylor, 167 U. S. 688,** that where an infant had borrowed money to pay off incumbrances on his land, giving a note for the borrowed money, and afterward avoided the note, the lender was entitled to be subrogated to the liens which had been removed by his money.

68—Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Strain v. Wright, 7 Ga. 568; Shirk v. Schultz, 113 Ind. 518; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345; Millsaps v. Estes, 137 N. C. 535, 107 Am. St. Rep. 496. 70 L. R. A. 170; Hoyt v. Wilkinson, 57 Vt. 404; Wallace v. Leroy 57 W. Va. 263, 110 Am. St. Rep. 777.

Where a deed was given by an adult to an infant, part of the price being unpaid, a letter written by the infant before he came of age, distinctly repudiating the transaction because of his infancy, is a final rescission of the deed, and the infant cannot afterward withdraw his letter and affirm the deed though no change of situation has occurred. The title to the land does not *ipso facto* revest; but the grantor may bring an action for a cancellation of the deed. McCarthy v. Woodcock Iron Co., 92 Ala. 463, 12 L. R. A. 136.

69—Ex p. McFerren, 184 Ala. 223, Ann. Cas. 1915 B 672, 47 L. R. A. (N. S.) 543; Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 53; Shipley v. Smith, 162 Ind. 526; Mustard v. Wohlford, 15 Gratt, (Va.) 329, 76 Am. Dec. 209.

An infant bought a piano on conditional sale, and after making several payments defaulted. The vendor retook the piano. The infant can then disaffirm the contract and recover back his payments. Curtice v. Kent, 89 Neb. 496, 52 L. R. A. (N. S.) 723 and note.

which he has had the benefit and which he cannot restore, he cannot reclaim the property or money that passed to him.[70] He can also of course defeat any claim against him for liability under the contract so avoided.

If the infant has rendered services under a contract of service which he afterward avoids, and he has not received the fair and reasonable value of the services rendered, he can recover a reasonable price for the services already rendered above what payments he has received.[71]

At this point there is a question on which the courts have differed: is the employer entitled to set off, against the infant's claim of reasonable compensation for what he has done, the injury sustained by the employer from the infant's breach of his contract?

Many early cases held that he was so entitled,[72] but this seems inconsistent with the general doctrine as to contracts of infants. It makes the infant liable for damages for breach of his executory contract. If the employer had already paid the infant for his services, he certainly could not recover damages for his subsequent quitting of the serv-

70—See, *ante*, notes 64-66.

71—Dallas v. Hollingsworth, 3 Ind. 537; Judkins v. Walker, 17 Me. 83, 35 Am. Dec. 229; Vent v. Osgood, 19 Pick. (Mass.) 572; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 850; Lufkin v. Mayall, 25 N. H. 82; Medbury v. Watrous, 7 Hill (N. Y.) 110; Dearden v. Adams, 19 R. I. 217. *Contra*, Weeks v. Leighton, 5 N. H. 343.

This rule of recovery by a *quantum meruit* applies in all cases where the infant has not yet received his pay for the labor done; but if he has already been paid, either in money or by stipulated benefits of other kinds, the doctrine that the court will not reopen an executed contract which was fair and beneficial to the infant will bar a further recovery, in the states where that doctrine is recognized. See *ante*, § 13.

The rule of *quantum meruit* does not necessarily result favorably to the infant; thus in Hagerty v. Nashua Lock Co., 62 N. H. 675, 13 Am. St. Rep. 607, it was found that the infant had been overpaid during a part of the time of his service, and he recovered less than the amount stipulated in the contract.

72—Moses v. Stevens, 2 Pick. (Mass.) 332; Thomas v. Dike, 11 Vt. 273, 34 Am. Dec. 690; Lowe v. Sinklear, 27 Mo. 308.

ice; and it is hardly just that the employer who has failed to pay for the services as rendered should thereby be put in a better position than if he had made such payment.

The true rule seems to be that the infant is entitled to recover for his services *quantum meruit;* that is, the actual reasonable value of the services which he has in fact rendered, without making any deduction for the employer's damage by his quitting the service; and to that effect are all the later cases.[73]

It should be noted that a contract by which the infant receives his support for his services is a contract for necessaries: and will be held valid and binding as such, if it is fairly made and reasonable in its terms.[74]

§ 15. Ratification of an infant's contract. It necessarily follows from the doctrine that the contract of an infant is not void, but merely voidable, that, if it is ratified by the infant after he reaches majority, it is treated as having been valid *ab initio.* It was always in fact valid, subject to the possibility of being avoided by the infant. When by his ratification he strips himself of the power to avoid it, the only qualification to its entire validity ceases to exist.

73—**Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286;** Widrig v. Taggart, 51 Mich. 103; Whitmarsh v. Hall, 3 Denio (N. Y.) 375.

See note, Ann. Cas. 1916 E 261.

74—Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; Wilhelm v. Hardman, 13 Md. 140; Squier v. Hydliff, 9 Mich. 274; and see Spicer v. Earl, 41 Mich. 191, 32 Am. Rep. 152.

The present English law seems to go far beyond this, and to hold that not only is a contract of hiring for a reasonable wage binding upon the infant, because beneficial to him, but that an agreement incidental to the employment, as to accept the insurance benefits contributed to by the employer as a substitute for the right to sue on the master's liability for an injury, is also binding. Clements v. London & N. W. R. Co., (1894) 2 Q. B. 482.

"There is another exception which is based on the desirableness of infants employing themselves in labor; therefore when you get a contract for labor, and you have a remuneration of wages, that contract, I think, must be taken to be *prima facie* binding upon the infant." DeFrancesco v. Barnum, 45 Ch. D. 430.

From this proposition several corollaries follow: 1. No new consideration is necessary.[75] Ratification does not make a new contract; but the original contract, which has always been in force, is relieved from the possibility of being destroyed by an act of avoidance.

2. An infant's contract cannot be ratified by him, so as to become binding, until he is of age.[76]

To hold otherwise would permit an infant to escape his disability by simply taking two steps instead of one: first making the contract, and then ratifying it. And manifestly the disability of an infant disqualifies him to make a contract binding upon him by ratification, as much as it does to make it binding by the original agreement.

If the infant dies before coming of age, ratification may be made by his executor or administrator.[77]

§ 16. Express ratification. Express ratification is made by any declaration which clearly states an intention to pay the debt, or carry out the contract, in question.

But there must be an actual promise to pay, either by direct terms or by the clear implication of the language used; a mere acknowledgment of the contract, or of legal liability thereon, is not sufficient.[78]

A promise to pay a part of the debt ratifies it as to the amount promised, but not as to any greater sum.[79]

75—Jefford v. Ringgold, 6 Ala. 544; Am. Mortgage Co. v. Dykes, 111 Ala. 178, 56 Am. St. Rep. 38; Thompson v. Linscott, 2 Me. 186, 11 Am. Dec. 57.

76—Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Sanger v. Hibbard, 104 Fed. 455.

77—Jefford v. Ringgold, 6 Ala. 544.

78—Benham v. Bishop, 9 Conn. 330, 23 Am. Dec. 358; Wilcox v. Roath, 12 Conn. 550; Martin v. Mayo, 10 Mass. 137, 6 Am. Dec. 103; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Sayles v. Christie, 187 Ill. 420; Fetrow v. Wiseman, 40 Ind. 148; Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307; Goodsell v. Myers, 3 Wend. (N. Y.) 479; Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574; Hatch v. Hatch, 60 Vt. 160.

79—Robbins v. Eaton, 10 N. H. 561. See, also, *post*, note 85.

A promise to pay the debt, or perform the contract, on some condition does not make the obligation binding unless the condition is shown to have been fulfilled; for instance, if the infant after coming of age should promise to pay the debt when he had the money, or when he was able to pay, that condition must be shown to have been fulfilled.[80]

The ratifying promise must be made to the other party to the contract; a declaration to a third party that the promisor would pay the debt would be of no avail.[81]

Another established rule, perhaps not so clearly justified as those above stated, is that it is not essential that the former infant, when promising to pay, knew that he was not legally liable. The contrary was held in some early cases, but the doctrine as stated is now established by the clear preponderance of authority.[82]

§ 17. **Implied ratification.** The former infant may also ratify his contract by acts adhering to it, or receiving the benefits of it, after coming of age. Thus if he continues in the possession of real estate which he purchased during infancy, or exercises acts of ownership over it, he ratifies

80—**Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325;** State v. Binder, 57 N. J. L. 374; Edgerly v. Shaw, 25 N. H. 514, 57 Am. Dec. 349; Goodsell v. Myers, 3 Wend. (N. Y.) 479; Bresee v. Stanly, 119 N. C. 278; Chandler v. Glover, 32 Pa. St. 509.

81—Sayles v. Christie, 187 Ill. 420; Mayer v. McClure, 36 Miss. 389, 72 Am. Dec. 190; Hoit v. Underhill, 9 N. H. 436, 32 Am. Dec. 380, 10 N. H. 220, 34 Am. Dec. 148; Bigelow v. Grannis, 2 Hill (N. Y.) 120; Chandler v. Glover, 32 Pa. St. 509.

82—**Bestor v. Hickey, 71 Conn. 181;** Clark v. Van Court, 100 Ind. 113, 50 Am. Rep. 774; Morse v. Wheeler, 4 Allen (Mass.) 570; Anderson v. Howard, 40 Ohio St. 325, 48 Am. Rep. 687.

There are a number of cases in which statements are quoted from text-books, naming the infant's knowledge of his rights to avoid the contract as one of the essential elements to a ratification. But in none of them does this rule appear to be essential to the decision of the case. Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28; Fetrow v. Wiseman, 40 Ind. 148; Bresee v. Stanly, 119 N. C. 278; Curtin v. Patton, 11 Serg. & R. (Pa.) 305.

See the note, 5 A. L. R. 137.

the contract of purchase, and becomes liable for what he promised to pay.[83]

And if he retains and uses personal property which he had bought, without any disclaimer of the contract, it will be ratified.[84]

The mere payment of a part of a debt does not ratify the remainder.[85] The infant may have considered that the amount which he paid is all that it is fair and equitable for him to pay; and if, when paying a part, he promised to pay

83—Irvine v. Irvine, 9 Wall. (U. S.) 617; Am. Mortgage Co. v. Dykes, 111 Ala. 178, 56 Am. St. Rep. 38; Robbins v. Eaton, 10 N. H. 561; Henry v. Root, 33 N. Y. 526.

"All the authorities recognize the doctrine that acts which would be insufficient to avoid such a deed may amount to an affirmance of it. * * * There is reason for this distinction between the effect of acts in avoidance and that of acts of confirmation. We have seen that an infant's deed is not void; it passed the title of the land to his grantee. Now, if the deed be avoided, the ownership of the land is re-transferred. The seisin is changed. There is fitness in the rule that title to land should not pass by acts less solemn than a deed; that the ownership shall not be divested by anything inferior to that which conferred it. On the other hand a confirmation passes no title; it effects no change of property; it disturbs no seisin. It is, therefore, itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner."

Irvine v. Irvine, 9 Wall. (U. S.) 617.

84—Hilton v. Shepherd, 92 Me. 160; Boyden v. Boyden, 9 Metc. (Mass.) 519; Cheshire v. Barrett, 4 McCord L. (S. C.) 241, 17 Am. Dec. 735.

Contra, Benham v. Bishop, 9 Conn. 330, 23 Am. Dec. 358, and Lamkin v. Ledoux, 100 Me. 581. But Lamkin v. Ledoux is based on a statute, and the opinion admits that the common law was otherwise.

Hobbs v. Hinton Foundry Co., 74 W. Va. 443, Ann. Cas. 1917 D 410, also seems *contra* to the rule stated in the text.

The fact that an infant partner after coming of age remained in the firm a few weeks, and drew money from it, does not make him liable for partnership debts which he supposed had been paid. Tobey v. Wood, 123 Mass. 88, 25 Am. Rep. 27.

85—Catlin v. Haddox, 49 Conn. 492, 44 Am. Rep. 249; Ford v. Phillips, 1 Pick. (Mass.) 22; Robbins v. Eaton, 10 N. H. 561; International Text Book Co. v. Connelly, 206 N. Y. 188, 42 L. R. A. (N. S.) 1115.

the remainder, the ratification results from the express, and not from the implied promise.

It is a question on which the courts differ very widely whether mere silence, failure to take any positive action to avoid a contract after coming of age, constitutes a ratification.

It has been held in some cases that mere silence by an adult as to a contract made while he was an infant, without any acts by which he recognizes or takes the benefit of it, does not constitute a ratification; but that he can avoid his contract, or bring a suit to recover the property which passed from him, at any time before his action is barred by adverse possession or by the statute of limitations;[86] while other courts hold that he must disaffirm within a reasonable time after reaching his majority, and that a failure to do so of itself constitutes a ratification.[87]

86—Sims v. Everhardt, 102 U. S. 300; Am. Mortgage Co. v. Dykes, 111 Ala. 178, 56 Am. St. Rep. 38; Putnal v. Walker, 61 Fla. 720, 36 L. R. A. (N. S.) 33; Sims v. Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Prout v. Wiley, 28 Mich. 164; Shipp v. McKee, 80 Miss. 741; Harris v. Ross, 86 Mo. 89, 56 Am. Rep. 41; McMurray v. McMurray, 66 N. Y. 175; Cresinger v. Welch, 15 Ohio 156, 45 Am. Dec. 565; Birch v. Linton, 78 Va. 584, 49 Am. Rep. 381; Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

Where an infant was also a *feme covert*, and died while under both disabilities, held that her heir, then a child of nine months, had until three years after majority to disaffirm, by analogy to the statute of limitations in the like case. Harris v. Ross, 86 Mo. 89, 56 Am. Rep. 411.

87—**Goodnow v. Empire Lumber Co., 31 Minn. 468, 47 Am. Rep. 798;** Kline v. Beebe, 6 Conn. 494; McCullough v. Finley, 69 Kans. 705; Criswell v. Criswell, 101 Neb. 349, L. R. A. 1917 E 1103; Searcy v. Hunter, 81 Tex. 644, 26 Am. St. Rep. 837.

There are many other cases which state the rule that ratification must be within a reasonable time, but in most of them there are special facts tending to prove ratification other than the mere lapse of time.

See the note, giving the cases on each side of this question, Ann. Cas. 1912 C 775; and as to what is a reasonable time within which the infant must disaffirm, see Hobbs v. Hinton Foundry Co., 74 W. Va. 443, Ann. Cas. 1917 D 410 and note.

Doubtless in most cases the difference is in the mode of stating the rule, rather than in the actual decision of cases upon identical facts. It would happen only rarely that there would be acquiescence for a long series of years in an unexecuted contract without some statement showing the party's intention with regard to it, or some act of possession or enjoyment of the fruits of the contract. The real test between the two doctrines as stated is whether the question as to the reasonableness of the time which elapsed before disaffirmance should be settled by the jury or court as a question of fact, or whether the statute of limitations would be the only standard of reasonableness.

But if long continued acquiescence has been coupled with other facts which would make it unjust to permit the contract to be avoided, as if the occupant of land under conveyance from a former infant had to his knowledge made valuable improvements upon it, or sold it to a third person ignorant of the defect of title, or borrowed money by mortgage to *bona fide* parties, the former infant will be estopped from doing injustice by afterward avoiding the title to such land.[88]

Ratification, like avoidance, is bilateral; that is, the whole transaction is affirmed and made valid. Thus if an infant buys land and mortgages it back for the price, an affirmance of the purchase, either express or implied, as by acts of ownership, will ratify the mortgage also.[89]

§ 18. Liability of an infant for torts. The general rule as to the wrongful acts or torts of an infant is that he is

88—Irvine v. Irvine, 9 Wall. (U. S.) 617; Dolph v. Hand, 156 Pa. St. 91, 36 Am. St. Rep. 25; Davis v. Dudley, 70 Me 236, 35 Am. Rep. 318; Wheaton v. East, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251.

89—**Am. Mortgage Co. v. Dykes, 111 Ala. 178, 56 Am. St. Rep. 38;** Dana v. Coombs, 6 Greenl. (Me.) 89, 19 Am. Dec. 194; Uecker v. Koehn, 21 Nebr. 559, 59 Am. Rep. 849; Robbins v. Eaton, 10 N. H. 561; Lynde v. Budd, 2 Paige (N. Y.) 191, 21 Am. Dec. 84; Kennedy v. Baker, 159 Pa. St. 146; Miller v. Sims, 2 Hill Ch. (S. C.) 479; Cheshire v. Barrett, 4 McCord L. (S. C.) 241, 17 Am. Dec. 735.

liable therefor.[90] Since in this case the other party is not at fault, and loss has occurred by an act of the infant, it seems that the loss from his folly or dishonesty, or even his mere negligence, should fall upon his own property rather than upon that of others. This applies alike to injuries by violence, as a battery, or by negligence; although, of course, in determining the question of negligence the standard of care required from an infant would be less than that required of an adult, and would be very slight indeed if the infant were a young boy or girl.[91]

And since the rule rests upon the fact that an actual loss has occurred, and the necessity of imposing it upon the estate which can most justly be required to bear it, rather than on the desire to punish a wrongdoer for his fault, the infant is liable only for compensatory, and not for exemplary or vindictive damages.[92]

The law, however, is very careful not to make this liability of the infant for his tort a means of overcoming and nullifying his protection from his contracts. The tort must be a

90—**Huchting v. Engel, 17 Wisc. 230, 84 Am. Dec. 741;** Neal v. Gillett, 23 Conn. 437; Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81; Scott v. Watson, 46 Me. 362, 74 Am. Dec. 457; Conway v. Reed, 66 Mo. 346, 27 Am. Rep. 354; Peigne v. Sutcliffe, 4 McCord L. (S. C.) 387, 17 Am. Dec. 756.

"The minor is not exempt from liability though the trespass was committed by the express command of his father." Scott v. Watson, 46 Me. 362, 74 Am. Dec. 457; Humphrey v. Douglas, 10 Vt. 71, 33 Am. Dec. 177.

If a wall on the minor's land is negligently left in an unsafe condition, so that it falls on a neighbor's property and damages it, the infant is liable, though he had a guardian over his person and estate. McCabe v. O'Connor, 4 App. Div. (N. Y.) 354.

91—Two interesting cases in regard to the liability of a child when an injury results from heedless activity in the course of play (the first of which was decided in favor of the defendant and the second for the plaintiff) are **Briese v. Maechtle, 146 Wis. 89, Ann. Cas. 1912 C 176 and note, 35 L. R. A. (N. S.) 574,** and Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81.

92—Huchting v. Engel, 17 Wisc. 230, 84 Am. Dec. 741; Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81.

distinct and positive wrong, of which the essence is not a mere breach of contract.[93]

Thus if one hires a horse and by ignorance or unskilfulness injures him, it is regarded as a mere breach of the contract between the infant and the owner of the horse; but if he wantonly abuses the horse, or uses him for a purpose not within the hiring, the action rests on a tort and is maintainable. And so with a bailment of goods to the infant for the purpose of working upon them. Lack of skill is a breach of contract and not actionable; willful injury to the goods or theft of them is actionable as a tort.

The whole doctrine of liability for torts is applied with much favor to the infant. "The dominant consideration is not that of liability for their torts, but of protection from their contracts."[94]

Since an infant cannot appoint an agent, he is not liable for the tort of one in his employ, as for instance a janitor of his property.[95]

93—**Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189;** Caswell v. Parker, 96 Me. 39; Lowrey v. Cate, 108 Tenn. 54, 91 Am. St. Rep. 744, 57 L. R. A. 673; Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659.

"The fraudulent act, to charge him, must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover or case, by a change in the form of the action." 2 Kent's Com. 241.

See, as typical cases illustrating the distinction stated in the text, on the side of liability, Burnard v. Haggis, 14 Com. B. (N. S.) 45, 108 E. C. L. 45; Patterson v. Kasper, 182 Mich. 281, L. R. A. 1915 A 1221; Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; Wilt v. Walsh, 6 Watts (Pa.) 9; Freeman v. Boland, 14 R. I. 39, 51 Am. Rep. 340; Towne v. Wiley, 23 Vt. 355, 56 Am. Dec. 85; on the side of non-liability, Jennings v. Rundell, 8 Durnf. & East (Term. Rep.) 335; Collins v. Gifford, 203 N. Y. 465, Ann. Cas. 1913 A 969 and note, 38 L. R. A. (N. S.) 202; Penrose v. Curren, 3 Rawle (Pa.) 351, 24 Am. Dec. 356.

In two Illinois cases, the infant has been held liable for goods sold to him, in one case because he bought the goods intending not to pay for them, and in the other because he gave in payment his check which he knew was not good and would be protested. Ashlock v. Vivell, 29 Ill. App. 388; Mathews v. Conway, 59 Ill. 341.

94—**Slayton v. Barry, 175 Mass. 513, 78 Am. St. Rep. 510, 49 L. R. A. 560.**

The particular question whether an infant is liable in an action of tort when he has procured property under a contract which he obtained by falsely declaring that he was of age is a difficult one, and has caused a conflict in the decisions. Some of the cases have held that to hold him liable under such circumstances would be to indirectly enforce the contract;[96] while others, constituting probably a majority of the American courts, hold that the infant is liable for such a fraud.[97]

But the measure of recovery is the damage done by the fraud, not that resulting from breach of the contract; the action should be in tort, and brought directly upon the false representations, there must be proof of the defendant's knowledge of the falsity of his statements, and his representations cannot be asserted as an estoppel against the plea of infancy.

§ 19. Actions by or against an infant. To enforce the rights and liabilities which have been discussed in this chapter, it is often necessary that actions at law or in equity should be brought by or against infants. They cannot, however, in any case sue or defend in their own names.

At common law the representative of an infant in bringing a suit for him was entitled his *prochein ami* or next friend; he who defended for the infant was called his guardian *ad litem*.

There was at common law, and still is in most of the states, no appointment in advance of any one to act as next friend for an infant in bringing suit; his father or general

95—**Covault v. Nevitt, 157 Wis. 113, Ann. Cas. 1916 A 959 and note, 51 L. R. A. (N. S.) 1092 and note.**

96—Johnson v. Pie, 1 Lev. 169, 1 Keb. 905, 913; Leslie v. Shiell (1914) 3 K. B. 607, Ann. Cas. 1916 C 992, 2 Brit. Rul. Cas. 738 and note; Slayton v. Barry, 175 Mass. 513, 78 Am. St. Rep. 510, 49 L. R. A. 560; Nash v. Jewett, 61 Vt. 501, 15 Am. St. Rep. 931, 4 L. R. A. 561.

97—**Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 53;** Fitts v. Hall, 9 N. H. 441.

As to his liability in an action of contract see *ante*, § 8, note 42.

guardian, or any person claiming the right to act for the infant, may bring the suit as next friend in the infant's behalf. The protection of the infant against an unfair or wrongful exercise of that right rests in the control vested in the court; which, if it finds that the action is not being properly prosecuted in the infant's interest, will remove the next friend who is acting and appoint another, or, if it is satisfied that it is not for the infant's interest to prosecute the suit at all, will dismiss it.[98]

It is not essential that the infant should direct or even consent to the bringing of the suit; of course he may often be too young to exercise any judgment or control in relation thereto.[99]

The infant is the real plaintiff in the action; it is his residence, and not that of the next friend, which fixes the venue; his citizenship determines the question of federal jurisdiction; his admissions are admissible against him, and those of the next friend are not; if the infant becomes of age while the action is pending, the next friend simply ceases to act and the plaintiff goes on with the suit on his own behalf; if the next friend dies the action does not abate, but another is substituted in his place by the court.[100]

98—**Tripp v. Gifford, 155 Mass. 108, 31 Am. St. Rep. 530;** Re Moore, 209 U. S. 490; Swoope v. Swoope, 178 Ala. 157, Ann. Cas. 1914 A 937 and note; Apthorp v. Backus, Kirby (Conn.) 407, 1 Am. Dec. 26; Williams v. Cleveland, 76 Conn. 426; Ziegler v. Ziegler, 39 Ind. App. 21; Clark v. Gilmanton, 12 N. H. 315; Fulton v. Rosevelt, 1 Paige (N. Y.) 178, 19 Am. Dec. 409; Miles v. Kaigler, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425; Fletcher v. Parker, 53 W. Va. 22, 97 Am. St. Rep. 991.

This mode of suit by infants was devised as long ago as 1285 in the famous Statute of Westminster II, ch. 15. "In omni casu quo minores infra aetatem implacitare possunt, concessum est quod propinquiores amici admittantur ad sequendum pro eis."

99—McKarrick v. Kealey, 70 Conn. 646.

100—Morgan v. Potter, 157 U. S. 195; Blumenthal v. Craig, 81 Fed. 320; Mo Pac. R. Co. v. Moffat, 60 Kans. 113, 72 Am. St. Rep. 343; Raming v. Met. St. R. Co., 157 Mo. 477; Bernard v. Merrill, 91 Me. 358; Webb v. Harris, 32 Okla. 491,

The duty of the next friend ends with the obtaining of a judgment. The judgment is an asset collectible only by the general guardian. The acceptance of payment and discharge of the judgment by the next friend is not binding upon the infant.[101]

In the modern code practice of New York, the representative of the plaintiff as well as that of the defendant is called a guardian *ad litem*, and must be appointed by the court before he can act as such.[102]

The infant defends either in a civil suit or in a criminal prosecution by guardian *ad litem*.

Not only is it true that he cannot defend himself except by a guardian *ad litem*, but no judgment can be taken against him, nor any valid proceedings had in the suit, till such a guardian is appointed for him. It is therefore incumbent on the prosecuting attorney in every criminal prosecution and on the plaintiff's attorney in every civil action, to see to it that the appointment of a guardian *ad litem* is made for every infant defendant; otherwise any judgment rendered in the action will be erroneous.

In many cases, this appointment is the merest technicality; the attorney who has already been employed by the infant may be appointed guardian *ad litem*, and no practical difference in the conduct of the suit results; or the action may already be properly defended by the adult defendants; but, even in cases where the appointment is a mere technicality, it is one which is absolutely necessary to the rendering of a valid agreement.[103]

Ann. Cas. 1914 A 602; Shuttlesworth v. Hughey, 6 Rich. L. (S. C.) 329, 60 Am. Dec. 130.

101—Paskewie v. East St. Louis R. Co., 281 Ill. 385, L. R. A. 1918 C 52 and note.

102—N. Y. Code of Civil Proc., §§ 469, 470, 472.

103—Johnson v. Waterhouse, 152 Mass. 585, 23 Am. St. Rep. 858, 11 L. R. A. 440; Griffith v. Ventress, 91 Ala. 366, 24 Am. St. Rep. 918, 11 L. R. A. 193; Johnson v. So. Pac. R. Co., 150 Cal. 535; Md. Casuality Co. v. Lanham, 124 Ga. 859; Peak v. Shasted, 21 Ill. 137, 74 Am. Dec. 83; Bloom v. Burdick, 1 Hill (N. Y.) 130, 37 Am.

A judgment without such appointment is not, however, void, but is merely erroneous and voidable.[104]

Dec. 299; Weaver v. Glen, 104 Va. 443.

For an interesting discussion as to the mode of compensation of a guardian *ad litem* appointed by the court, and the amount thereof, see Richardson v. Tyson, 110 Wisc. 572, 84 Am. St. Rep. 937.

As to whether appearance for an infant defendant by his general guardian is sufficient, or a special guardian *ad litem* must be appointed, see note, Ann. Cas. 1912 D 363.

104—Linn v. Collins, 77 W. Va. 592, Ann. Cas. 1918 C 86.

PART II

INSANE AND INCOMPETENT PERSONS

CHAPTER II

INSANE AND INCOMPETENT PERSONS.

§ 20. Insanity. Insanity, as used in the law, is a comprehensive term including all kinds and degrees of mental deficiency or derangement which render a person incapable of rational self-control, and which destroy his capacity to enter into a contract or perform other acts requiring the use of reason.[1] The Latin phrase *non compos mentis* (which literally translated means "not in control of the mind," but is usually translated "not of sound mind") is used with substantially the same wide scope.[2]

1—"Insane is composed of two Latin words: *in* (not) and *sanus* (sound). It means unsound. There is very little difference between an insane man and a man of unsoundness of mind and memory." Nicewander v. Nicewander, 151 Ill. 156.

The R. I. Statute defines an insane person to include "every idiot, person of unsound mind, lunatic and distracted person." Cundell v. Haswell, 22 R. I. 508.

"A man may be certainly insane, although he be not either a raving maniac or an absolute imbecile. Nor is it necessary that a delusion which possesses him should at all times operate with the same force, or that his self-control should at all times be entirely lost." Haviland v. Hayes, 37 N. Y. 25.

In Gillmore v. Gillmore, 91 Kan. 707, 51 L. R. A. (N. S.) 834, it was held that addiction to the morphine habit such as to bring one utterly under the influence of another may constitute unsoundness of mind.

In Owing's case, 1 Bland Ch. (Md.) 370, 17 Am. Dec. 311, there is an elaborate attempt to distinguish and define the different types of insanity; but however valuable this medico-legal discussion may have been in 1826, it can hardly be regarded as of scientific value at the present time.

See the general discussion of the manifestations of insanity in Mutual Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580.

2—**Owing's case, 1 Bland Ch. (Md.) 370, 17 Am. Dec. 311;** Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514; Jackson v. King, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354; Beaumont's case, 1 Whart. (Pa.) 52, 29 Am. Dec. 33 and note.

"Under the generic term *non compos mentis* is comprehended

It includes therefore not only mania, or the violent derangement of the mental powers by disease, but also idiocy and imbecility, terms which indicate a complete or nearly complete absence of the reasoning powers,[3] dotage or senile dementia, which indicates the loss of mental capacity as a result of old age,[4] and the myriad other forms of mental impairment which are catalogued by physicians and alienists.

The topic also includes such classes of partial insanity as

every species of mental derangement which incapacitates a man from assenting to or making a legal contract." Owing's case, *supra.*

3—People v. Crosswell, 13 Mich. 427, 87 Am. Dec. 774.

Blackstone distinguishes between an idiot who "hath had no understanding from his nativity," and a lunatic or *non compos* who has lost the use of his reason. 1 Bl. Com. 302, 304; Hale v. Hills, 8 Conn. 44.

It was said in an early case that a person who was deaf, dumb and blind would be considered in law as incapable of any understanding, "being deficient in those inlets which furnish the human mind with ideas." Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187. But in view of the results of modern educational methods as shown in the case of Helen Keller and of many less brilliant and famous persons, this statement may well be considered obsolete. A modern case which holds a deaf mute capable of contracting, citing many cases to the same effect, is Alexier v. Matzke, 151 Mich. 36, 123 Am. St. Rep. 255, 14 Ann. Cas. 1917 B 238, it was said in this case that "the plaintiff appearing to be a deaf mute, the burden of proof is on the defendant to show that plaintiff executed the contract understandingly."

In Belcher v. Com., 165 Ky. 649, Ann. Cas. 1917 B 238, it was held that the fact that the accused is a deaf mute is simply a circumstance to be considered with others in determining his mental capacity to commit crime.

In Rex v. Stafford Prison, (1909) 2 K. B. 81, 10 Ann. Cas. 442 and note, is an interesting discussion of the English practice when the accused is a deaf mute unable to understand the course of the trial.

4—Owing's case, 1 Bland Ch. (Md.) 370, 17 Am. Dec. 311; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97.

It was held in Fairfield v. Gullifer, 49 Me. 360, 77 Am. Dec. 265, that the words "in his dotage" do not allege insanity. "Dotage means simply feebleness or imbecility of mind, loss of understanding, as in old age."

monomania[5] or insane delusions,[6] in which the subject is

5—Dibble v. Currier, 142 Ga. 855, Ann. Cas. 1916 C 1.

See Owing's case, 1 Bland Ch. (Md.) 370, 388, 17 Am. Dec. 311, 326.

"A man may be mad on all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent. This is general insanity. * * * Partial insanity is confined to a particular subject, the man being sane on every other. In that species of madness it is plain that he is a responsible agent, if he were not instigated by his madness to perpetrate the act." Com. v. Wireback, 190 Pa. St. 138, 70 Am. St. Rep. 625.

6—Medill v. Snyder, 61 Kan. 15, 78 Am. St. Rep. 307; Middleditch v. Williams, 45 N. J. Eq. 726, 4 L. R. A. 738; Taylor v. Trich, 165 Pa. St. 586, 44 Am. St. Rep. 679; Thomas v. Carter, 170 Pa. St. 272, 50 Am. St. Rep. 170.

See the extended notes as to insane delusions, 63 Am. St. Rep. 80, Ann. Cas. 1916 C 4, 37 L. R. A. 261, and 27 L. R. A. (N. S.) 62.

"An insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the afflicted individual, and which refuses to yield either to evidence or reason." Irwin v. Lattin, 29 S. D. 1, Ann. Cas. 1914 C 1044.

"A false belief for which there is no reasonable foundation, and which would be incredible under the given circumstances to the same person if of sound mind, and concerning which his mind was not open to permanent correction through evidence or arguments." Kimberley's Appeal, 68 Conn. 428, 57 Am. St. Rep. 101 and note, 37 L. R. A. 261 and note.

Delusions are conceptions that originate spontaneously in the mind without evidence of any kind to support them, and which can be accounted for on no reasonable hypothesis. They have no foundation in reality, and spring from a diseased or morbid condition of the mind." Potter v. Jones, 20 Oreg. 239, 12 L. R. A. 161.

"Insanity is a disease of the mind, and delusion a symptom of the disease." Ryan v. People, 60 Colo. 425, L. R. A. 1917 F 646.

A belief in spiritualism is not in itself evidence of insanity; but if an insane delusion grows out of such belief a will induced by such insane delusion is not the product of a sane mind." Irwin v. Lattin, 29 S. D. 1, Ann. Cas. 1914 C 1044 and note; Connor v. Stanley, 72 Cal. 556, 1 Am. St. Rep. 84; Orchardson v. Cofield, 171 Ill. 14, 63 Am. St. Rep. 211, 40 L. R. A. 256; Owen v. Crumbaugh, 228 Ill. 380, 119 Am. St. Rep. 442, 10 Ann. Cas. 606; O'Dell v. Goff, 149 Mich. 152, 119 Am. St. Rep. 662, 10 L. R. A. (N. S.) 989; and see note, 37 L. R. A. 270.

"A belief in witchcraft is not of itself evidence of insanity." It is held in this case that evidence that a testator disinherited children for undutiful conduct which he attributed to their being be-

sane generally, but has some irrational belief or obsession, due to mental disease or aberration, that makes him incapable of rational action on any matter affected by the delusion; and such cases of uncontrollable and irrational chronic desire to commit a particular kind of criminal act as kleptomania, an insane impulse to steal,[7] dipsomania, an insane passion for intoxicating liquors,[8] or pyromania, an insane impulse to set fires.[9]

But while the law does not attempt to follow medical science in analyzing and naming the various kinds of mental deficiency or aberration, it applies to every class of cases in which a man's mental capacity comes in question, the practical test: had he such mental power that he could understand and rationally act on the particular subject-matter in question:[10] if the making of a contract is in question, had he sufficient intellect to understand the meaning and effect

witched, and that he believed that his wife and daughters were witches and practiced their infernal arts upon him, was not cause for setting aside a will. Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81. A similar case, also sustaining the will, was Lee v. Lee, 4 McCord (S. C.) 183, 17 Am. Dec. 722. It may be doubted whether either of these cases would be followed at the present time. See *post*, § 24, note 8.

7—**Looney v. State, 10 Tex. Ap. 520, 38 Am. Rep. 646;** State v. Riedell, 9 Houst. (Del.) 550; State v. McCullough, 114 Iowa 532, 89 Am. St. Rep. 382, 55 L. R. A. 378; Lewis v. Lewis, 44 Minn. 124, 20 Am. St. Rep. 559, 9 L. R. A. 505; State v. Riddle, 245 Mo. 451, Ann. Cas. 1914 A 884 and note, 43 L. R. A. (N. S.) 150 and note.

8—State v. Riedell, 9 Houst. (Del.) 550. "Whether there is such a disease as dipsomania is a question of science and fact, not of law." State v. Pike, 49 N. H. 399, 6 Am. Rep. 533.

See the note, 19 Ann. Cas. 1172.

9—Century Dictionary, *sub verbo*.

10—Dunphy v. Dunphy, 161 Cal. 380, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913 B 1230; Campbell v. Campbell, 130 Ill. 466, 6 L. R. A. 167. "However necessary analysis and classification of mental diseases may be to the science of medicine, they are impracticable and unnecessary in legal science. In law every mind is sound that can reason and will intelligently in the particular transaction being considered, and every mind is unsound that cannot so reason or will. The law investigates no farther." Johnson v. Maine, 83 Me. 182.

of the contract;[11] if the making of a will, was he mentally capable of knowing what property he had to dispose of and appreciating the reasonable claims upon him of his various kindred and friends, and free from any insane delusion which would affect his testamentary dispositions;[12] if the question is as to his competency to testify as a witness, has he sufficient understanding to understand the obligation of the oath, and to be capable of giving a trustworthy account of the matters which he has seen and heard.[13]

If insanity be asserted as a defense in a criminal prosecution, the first question is whether the accused was of such mental capacity as to understand the nature and consequences of the act which he was committing, and to know that it was wrong. But to this primary test there is added the question whether the accused was impelled by a morbid desire to commit the act in question, which impulse was created by mental disease and was too strong for his will to overcome. This defense of irresistible impulse, or, as it is sometimes called, moral insanity, is recognized by the courts of some of the American states and denied in others. Akin to this is so-called emotional insanity, where the loss of reason and self-control is temporary, and is produced not by mental disease but by violent passion or other emotion. This

11—See *post*, § 23.

12—See *post*, § 24.

13—**Dist. of Columbia v. Armes, 107 U. S. 519**; Worthington v. Mencer, 96 Ala. 310, 17 L. R. A. 407; State v. Simes, 12 Idaho 310, 9 Ann. Cas. 1216; Peo. v. Enright, 256 Ill. 221, Ann. Cas. 1913 E 318 and full note; Coleman v. Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711, Thayer's Cases on Evidence, 2nd ed., 1075.

It is said in Worthington v. Mencer, *supra*, that one who is so mentally deficient as not to be chargeable with contributory negligence for his part in a collision is not a competent witness to the facts of the collision.

But in State v. Simes, *supra*, a witness was held competent to testify to a rape upon her, though the charge was based on her being incapable to consent to the act by reason of her mental unsoundness. That a witness had been adjudged insane, which adjudication is still in force, is admissible to affect the weight of his evidence. Mason v. State, 74 Tex. Cr. 256, Ann. Cas. 1917 D 1094.

species of fury or temporary insanity, if it can legitimately be called insanity at all, has never been accepted as a justification or excuse for the committing of a crime. But the topic of insanity as a defense for a criminal prosecution is too complex to be briefly summarized, and reference must be had to a later section, where it will be discussed more at length.[14]

§ 21. **Proceedings to establish insanity.** The question whether a given person is sane or insane may often arise in the course of ordinary civil suits or criminal prosecutions, as when the mental competency of one who made a will or contract, or entered into a marriage, is denied in a suit to establish such will, contract or marriage, or when insanity is made a defense to a criminal charge. In such cases the fact is to be proved by the ordinary methods, and under the ordinary rules of evidence.

In the nature of things opinion evidence is important in trying this issue, qualified experts being permitted to express their opinion as to the sanity of the party based on his conduct and appearance, which they have seen and to which they testify, and also by answering hypothetical questions, in which are embodied the facts that are claimed to have been proved by the witnesses to fact;[15] and it is usually held that non-expert witnesses may also testify to their opinion as to the sanity or insanity of the person in question, if they have had adequate opportunity for observation of his conduct, first stating to the jury the observed facts on which their testimony is based.[16]

14—See *post*, § 25.

15—Conn. Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, Thayer's Cases on Evidence, 2nd ed., 681; Grand Lodge v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123; Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106.

See the note, 39 L. R. A. 305, covering the entire subject of expert evidence as to sanity.

16—Conn. Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, Thayer's Cases on Evidence, 2nd ed., 681; Atwood v. Atwood, 84 Conn. 169, 37 L. R. A. (N. S.) 591; State v. Rumble, 81 Kan. 16, 25 L. R. A. (N. S.) 376; Com. v. Wireback, 190 Pa.

Evidence of the insanity of ancestors and collateral relatives of the person in question is admissible, but only when there is direct evidence of his own insanity.[17]

In the absence of any evidence as to a person's mental condition his sanity will be presumed, since sanity is the normal and usual condition, and since a contrary rule would require proof of sanity to accompany every proof of a contractual or criminal act.[18] The exact effect of the presumption is one of the most disputed questions in the law of evidence.

Some authorities hold that the presumption is itself of evidential force, and that the party asserting the insanity of any person has always the burden of proof on that issue.[19] Other authorities hold that the presumption operates merely in the absence of evidence; and that when by the evidence introduced on either side the question of sanity is cast in doubt, the party having the burden of proving a contractual or criminal act must prove not only the physical act, but also the mental capacity on which responsibility is

St. 138, 70 Am. St. Rep. 625; Atkins v. State, 119 Tenn. 458, 13 L. R. A. (N. S.) 1031.

See the full note concerning non-expert opinion evidence as to sanity, 38 L. R. A. 721.

In New York and Oklahoma the witness is permitted to state his contemporaneous impression as to whether the person's conduct was rational or irrational, but not to give a general opinion as to his sanity. Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Re Myer, 184 N. Y. 54, 6 Ann. Cas. 26; Quennan v. Territory, 11 Okla. 261, 61 L. R. A. 324.

As to this distinction see Quennan v. Okla., 190 U. S. 548; Duthey v. State, 131 Wis. 178, 10 L. R. A. (N. S.) 1032.

17—James v. State, 193 Ala. 55, Ann. Cas. 1918 B 119 and note; Dillman v. McDaniel, 222 Ill. 276, 113 Am. St. Rep. 400.

18—Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Jackson v. Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; Grabill v. Barr, 5 Pa. St. 441, 47 Am. Dec. 418.

19—Sturdevant's Appeal, 71 Conn. 392, Thayer's Cases on Evidence, 2nd ed., 95; Egbers v. Egbers, 177 Ill. 82; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Delafield v. Parish, 25 N. Y. 9; Grabill v. Barr, 5 Pa. St. 441, 47 Am. Dec. 418; Re Cowdrey, 77 Vt. 359.

based.[20] This conflict is especially sharp on the question of the burden of proof as to sanity, when insanity is asserted as a defense to a criminal prosecution.[21]

20—Sutton v. Sadler, 3 C. B. (N. S.) 87, Thayer's Cases on Evidence, 2nd ed., 97; **Crowninshield v. Crowninshield, 2 Gray (Mass.) 521, Thayer's Cases 100,** Thayer's Preliminary Treatise on Evidence, pp. 382-3.

21—The rule which has been called the "American doctrine" is very convincingly stated in **Davis v. United States, 160 U. S. 469, Thayer's Cases 90,** as follows: "Upon whom must rest the burden of proving that the accused belongs to the class capable of committing crime? On principle it must rest upon those who affirm that he has committed the crime for which he is indicted. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case. The plea of not guilty is not a plea in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty, and his guilt cannot in the very nature of things be regarded as proved if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime. The law presumes that every one charged with crime is sane and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged. His guilt cannot be said to have been proved beyond a reasonable doubt if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime."

See also the lucid and convincing opinion in Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360.

A full presentation of the contrary or so-called English doctrine, that the burden of proving insanity rests upon the accused, may be found in **State v. Quigley, 26 R. I. 263, 67 Am. St. Rep. 322, 3 Ann. Cas. 920 and note, 67 L. R. A. 322.**

The cases upon this question are classified in Wigmore on Evidence, volumes IV and V, § 2501; but Professor Wigmore errs in placing the New York cases in his second class; they clearly support the "American doctrine" as defined in Davis v. U. S., *supra*. A full citation of the cases on both

But if a state of general and permanent insanity is shown to have existed at a certain time, there is a presumption of its continuance, which requires one alleging sanity at a later time to assume the burden of proof.[22]

Besides these cases in which sanity becomes a subordinate issue, it is sometimes necessary to bring a direct proceeding to declare a person insane in order to procure his confinement in an asylum or other place suitable for his care, or to obtain legal authority for some one to manage for him the affairs that he has become incompetent to manage for himself. In the earliest English law the lord of the fee, and later the King as Lord of the entire realm and *parens patriae,* had the custody of idiots and lunatics and the control and income of their lands. But the fact of lunacy had first to be established by the verdict of a jury, and to procure such verdict the writ *"de lunatico inquirendo"* or *"de idiota inquirendo"* was used. This writ could be prayed out by anyone, even by a stranger, though of course it was usually applied for by some near relative to the supposed lunatic.[23] In the United States the State has succeeded to the office of the King as the supreme guardian of those who need the public care, and the process is by application to the

sides is also given in Adair v. State, 6 Okla. Crim. 284, 44 L. R. A. (N. S.) 119 and note.

22—Re Cochran's will, 1 T. B. Mon. (Ky.) 264, 15 Am. Dec. 116, and note; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Jackson v. King, 4 Cow. (N. C.) 207, 15 Am. Dec. 354; Clark v. Fischer, 1 Paige Ch. (N. Y.) 171, 19 Am. Dec. 402; Re Brown, 39 Wash. 160, 109 Am. St. Rep. 868, 4 Ann. Cas. 488 and note, 1 L. R. A. (N. S.) 540.

Corbit v. Smith, 7 Iowa 60, 71 Am. Dec. 431, distinguishes between a former state of insanity "habitual and apparently confirmed, or one only temporary and not continuous," and holds that the existence of a prior period of lunacy of the latter kind will not throw the burden of proof upon the party asserting competency.

23—**Hughes v. Jones, 116 N. Y. 67, 15 Am. St. Rep. 386, 5 L. R. A. 632;** Dodge v. Cole, 97 Ill. 338, 37 Am. Rep. 111; Hamilton v. Traber, 78 Md. 26, 44 Am. St. Rep. 258; Re Connor, 254 Mo. 65, 49 L. R. A. (N. S.) 1108; State v. Guinotte, 257 Mo. 1, Ann. Cas. 1915 D 658, 51 L. R. A. (N. S.) 1191; 1 Blackstone's Com. 303, 305.

courts having jurisdiction by statute, usually the chancery courts or those having jurisdiction of probate matters.[24] Legal notice to the alleged lunatic and an opportunity to appear at the hearing and oppose the application are essential to the jurisdiction of the court; if his lunacy is such as makes it necessary to dispense with this, the justifying facts should appear on record.[25]

From the necessity of the case an insane person may be temporarily restrained without legal process, if need be in an asylum, if his going at large is dangerous to himself and others; but such detention must be followed by the institution of legal proceedings to determine his mental condition and provide for his permanent care.[26]

One who voluntarily applies for admission to a private hospital, and signs an agreement to abide by its rules, does not thereby surrender all control of himself. If he after-

24—Sears v. Terry, 26 Conn. 273; Hamilton v. Traber, 78 Md. 26, 44 Am. St. Rep. 258; State v. Billings, 55 Minn. 467, 43 Am. St. Rep. 425; DeHart v. Condit, 51 N. J. Eq. 611, 40 Am. St. Rep. 545.

In Dodge v. Cole, 97 Ill. 338, 37 Am. Rep. 111, the power to sell real estate of a lunatic was held to be a part of the inherent jurisdiction of the Court of Chancery, which it might exercise without a specific statute. In other cases the power is held to depend on express statute provisions.

25—**Re Allen, 82 Vt. 365, 26 L. R. A. (N. S.) 232 and note;** McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; Re Lambert, 134 Calif. 626, 86 Am. St. Rep. 296, 55 L. R. A. 856; Supreme Council Royal Arcanum v. Nicholson, 104 Md. 472, 10 Ann. Cas. 213 and note; State v. Billings, 55 Minn. 467, 43 Am. St. Rep. 426; Dutcher v. Hill, 29 Mo. 271, 77 Am. Dec. 572; Re Blewitt 131 N. Y. 546; Re Gannon, 16 R. I. 537, 27 Am. St. Rep. 759, 5 L. R. A. 359; Evans v. Johnson, 39 W. Va. 299, 45 Am. St. Rep. 912, 23 L. R. A. 737 and note.

26—**Kelleher v. Putnam, 60 N. H. 30, 49 Am. Rep. 304;** Porter v. Ritch, 70 Conn. 235, 39 L. R. A. 353; Look v. Dean, 108 Mass. 116, 11 Am. Rep. 323; Re Gannon, 16 R. I. 537, 27 Am. St. Rep. 759, 5 L. R. A. 359; Re Allen, 82 Vt. 365, 26 L. R. A. (N. S.) 232.

Witte v. Haben, 131 Minn. 71, Ann. Cas. 1917 D 534 and note, L. R. A. 1016 A 228 and note, holds that a police officer is not justified in detaining a person as insane by the fact that he had been reported insane to the police, and that the defendant in good faith believed these reports to be true. See other cases upon this point cited in the notes.

ward desires to leave, the managers cannot detain him by force, unless he is in such condition as to make his detention necessary for his safety or that of others, in which case they should notify his friends and have legal steps taken for his confinement.[27]

It has been held recently that an adjudication of lunacy based on the report of a commission of six persons as provided by statute violates the constitutional right to a jury trial.[28] But most of the decisions upon this question hold that a jury trial is not essential. The conflict of decisions is perhaps due to the fact that in some states a jury had been used in such cases prior to the adoption of the constitution, and in other states not.[29]

A statute providing that one tried on a criminal charge and acquitted on the sole ground of insanity shall be confined as insane upon the order of the trial judge is valid. In this case the insanity of the accused has already been asserted by himself, and established by the verdict of a jury; and his right to afterward bring proper proceedings to recover his liberty, if he should be restored to sanity, affords an adequate protection against his being confined permanently because of an insane condition existing at the time of the crime, but from which he has recovered.[30] But if the statute expressly provides that he should not be released from confinement except by a special act of the legislature, it is unconstitutional.[31]

27—Cook v. Highland Hospital, 168 N. C. 250, Ann. Cas. 1917 C 158 and note, L. R. A. 1915 D 611 and note.

28—White v. White, 108 Tex. 570 L. R. A. 1918 A 339 and note.

29—Re Dowdell, 169 Mass. 387, 61 Am. St. Rep. 290; Ex p. Dagley, 35 Okla. 180, 44 L. R. A. (N. S.) 389; and see other cases cited in the note to White v. White, *supra*.

30—Re Brown, 39 Wash. 160, 109 Am. St. Rep. 868, 4 Ann. Cas. 488 and note, 1 L. R. A. (N. S.) 540 and note; Re Clark, 86 Kan. 539, Ann. Cas. 1913 C 317, 39 L. R. A. (N. S.) 680; People v. Chanler, 196 N. Y. 525, 25 L. R. A. (N. S.) 946 (the Thaw case). See Northfoss v. Welch, 116 Minn. 62, Ann. Cas. 1913 A 1257 and note, 36 L. R. A. (N. S.) 578 and note.

31—Re Boyett, 136 N. C. 415, 103

One convicted of crime is not entitled after sentence to assert his present insanity and demand a trial of that issue before a common-law jury. The determination of his sanity by a sheriff's jury in accordance with statute is due process of law.[32]

§ 22. **Proceedings to appoint a guardian for an incompetent.** The inability of a person of disordered or enfeebled mind to manage his property and affairs, or to care for himself personally in cases not aggravated enough to require his confinement, often makes necessary the appointment of a guardian, committee or conservator (as such trustee is called in different states) to manage his person or property, or both. In some states the statutory provision for appointment of a guardian to an adult person is conditioned on the person being insane, of unsound mind, or other equivalent phrase, and in those states the proceeding for the appointment of a guardian is virtually an inquisition of lunacy.[33]

But in other states, principally in New England, the statutes provide for the appointment of a guardian to one who is incompetent to manage his affairs though his incompe-

Am. St. Rep. 944, 1 Ann. Cas. 729, 67 L. R. A. 972.

32—Nobles v. Georgia, 168 U. S. 398; Ferguson v. Martineau, 115 Ark. 317, Ann. Cas. 1916 E 421 and note; State v. Smith (N. M.) 3 A. L. R. 83.

33—Eslave v. Lepretre, 21 Ala. 504, 56 Am. Dec. 266; Emerick v. Emerick, 83 Iowa 411, 13 L. R. A. 757 and note; Lindsey's Case, 44 N. J. Eq. 564, 6 Am. St. Rep. 913; Heckman v. Adams, 50 Ohio St. 305; Beaumont's Case, 1 Whart. (Pa.) 52, 29 Am. Dec. 33; Manley v. Staples, 62 Vt. 153, 8 L. R. A. 707.

"The jurisdiction of the court to appoint a guardian is not confined to cases of insanity, idiocy or lunacy, strictly so called, but extends to every case of mental unsoundness or imbecility which has reached such a degree, from whatever cause, as renders its subject incapable of conducting the ordinary affairs of life, and leaves him in a condition to become a victim of his own folly or the fraud of others. But in no case should the benevolent purpose of the statute be abused by the assumption of jurisdiction over the person or property of another until such a degree of mental unsoundness is clearly made to appear." McCammon v. Cunningham, 108 Ind. 545.

tency may not amount to imbecility or insanity, but may be the result of the feebleness of old age, of intemperate habits, or even of such a reckless or spendthrift disposition as seems likely to bring the person to want and make him a public charge.[34]

Jurisdiction to determine the fact of incompetency and to appoint a guardian is usually vested either in the courts of chancery or in those having jurisdiction over the probate of wills and administration of estates.[35]

Guardianship for insane and incompetent persons is covered by the same general principles as guardianship for infants, though the application of these principles is sometimes affected by the difference in the disability of the ward, the difference in the duration of the appointment, which in the case of an infant looks forward to a fixed date, that of his reaching majority, and the fact that the control of an infant and his property should be exercised so as to preserve it and fit him for assuming charge of it himself at his majority, while with an insane, intemperate or spendthrift ward the duration of the trust is indefinite, and the condi-

34—**Re Streiff, 119 Wis. 566, 100 Am. St. Rep. 903;** Wentz's Appeal, 76 Conn. 405; Fairfield v. Gullifer, 49 Me. 360, 77 Am. Dec. 265; Norton v. Leonard, 12 Pick. (Mass.) 152; Providence Co. Sav. Bk. v. Hughes, 26 R. I. 73, 106 Am. St. Rep. 682.

In Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97, it was held that one was "of unsound mind" within the meaning of such a statute if he "had lost his memory and understanding by old age, sickness or other accident, so as to render him incapable of transacting his business or of managing his property."

In Maryland there is a statute by which the provisions for appointment of committees to lunatics are expressly extended to include habitual drunkards. Tome v. Stump, 89 Md. 264. And the same is true in New York. Wadsworth v. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499.

35—Hare v. Show, 84 Ark. 32, 120 Am. St. Rep. 17; Kimball v. Fisk, 39 N. H. 110, 75 Am. Dec. 213; Re Sall, 59 Wash. 539, 140 Am. St. Rep. 885.

"The power lies in the sovereignty of the state; the procedure only is statutory." Re Sall, *supra.*

tion of the ward is often one of deterioration instead of gradual progress toward self-control.

The entire subject of the appointment, selection, powers and duties of guardians of both kinds, and of the supervision of the trusts by the appointing court, will be separately discussed in later chapters.[36]

36—See *post*, Part VI.

CHAPTER III

INSANE AND INCOMPETENT PERSONS.

II. THEIR LEGAL RESPONSIBILITY.

§ 23. Contracts of insane or incompetent persons. Since the essence of a contract is the meeting of minds, it is evident that if one of the parties is without mental capacity, the so-called contract is not a contract in fact. That the contract of an insane person should be held void or voidable is so evidently required by justice as to create surprise that it ever should have been denied. Blackstone points out that "In the time of Edward I, *non compos* was a sufficient plea to avoid a man's own bond;" but that a series of decisions in the fourteenth and fifteenth centuries, based on the specious phrase that "No man should be permitted to stultify himself," denied to the party himself the right to allege that he was insane when the contract was made. The absurdity of this rule was perceived even before Blackstone's day, and it has now long been obsolete.[1]

If upon an inquisition of lunacy or an equivalent proceeding he has been adjudged insane or incompetent to manage his affairs, that judgment gives notice to all the world of his incapacity, and any contract thereafter made by him is *ipso facto* void.[2] But if no adjudication of insanity or in-

1—II Black. Com. 291-2; **Barret v. Buxton, 2 Aik. (Vt.) 167, 16 Am. Dec. 691;** Owing's case, 1 Bland Ch. (Md.) 370, 17 Am. Dec. 311; Cameron-Backley Co. v. Thornton Light & Power Co., 138 N. C. 365, 107 Am. St. Rep. 532; Bensell v. Chancellor, 5 Whart. (Pa.) 371, 34 Am. Dec. 561.

2—Re Walker (1905) 1 Ch. 160, 4 Brit. Rul. Cas. 432 and note; American Trust Co. v. Boone, 102 Ga. 202, 66 Am. St. Rep. 167, 40 L. R. A. 250; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; L'Amoureux v. Crosby, 2 Paige

competency had been made, the question of his mental competency to enter into a contract must be determined by the tribunal which is asked to enforce the contract; and the decisive test is: had he sufficient mental capacity to understand the act in which he was engaged, its scope and effect, nature and consequences.[3] If not, the contract is voidable by himself after restoration to sanity, by his guardian if one be appointed, or by his legal representatives after his death.[4]

But to this right to avoid the contract there are certain exceptions based on the necessity of doing justice to the

Ch. (N. Y.) 422, 22 Am. Dec. 655 and note; Hughes v. Jones, 116 N. Y. 67, 15 Am. St. Rep. 386, 5 L. R. A. 632,

Contra, McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610.

But the finding in such an inquisition that the person had been insane for a certain previous period is not conclusive as to acts before the adjudication. Den v. Clark, 10 N. J. L. 217, 18 Am. Dec. 417; Hutchinson v. Sandt, 4 Rawle (Pa.) 234, 26 Am. Dec. 127 and note; Sims v. McLure, 8 Rich. Eq. (S. C.) 286, 70 Am. Dec. 196.

If one has been adjudged an habitual drunkard and a guardian appointed for him, that *ipso facto* renders him incapable of contracting; any contract thereafter made by him is void, although he were sober when he made it. Wadsworth v. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499.

One who has been placed under guardianship as an habitual drunkard "is conclusively presumed to be incapable of conducting her affairs. She cannot transact any business. She cannot make a valid deed or bond * * * She cannot do anything which involves the exercise of discrimination and judgment." Philadelphia Ins. Co. v. Allison, 108 Me. 326, 39 L. R. A. (N. S.) 39.

3—Martin v. Harsh, 231 Ill. 384, 13 L. R. A. (N. S.) 1000; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Young v. Stevens, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202; Jackson v. King, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354 and note; Cameron-Backley Company v. Thornton Light & Power Co., 138 N. C. 365, 107 Am. St. Rep. 532; Sprinkle v. Wellborn, 140 N. C. 163, 111 Am. St. Rep. 827, 3 L. R. A. (N. S.) 174 and note.

4—**Hosler v. Beard, 54 Ohio St. 405, 56 Am. St. Rep. 720, 35 L. R. A. 161**; Field v. Lucas, 21 Ga. 447, 68 Am. Dec. 465; Northwestern Mutual Fire Insurance Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Wheeler v. McKeon, 137 Minn. 92, 1 A. L. R. 1514 and note; Sims v. McLure, 8 Rich. Eq. (S. C.) 196, 70 Am. Dec. 196.

other party. If the contract be for necessaries furnished to the incompetent, or to his family which he is bound to support, his property is liable, not on the express contract, but for the reasonable value of the necessaries furnished.[5]

And if the contract were made by the other party fairly and in good faith, without knowledge of the mental infirmity, and it has been executed so that the other party cannot be restored to his former position, the contract will not be set aside to his damage; since when both parties have acted without intentional fault, the loss resulting from the incompetent person's misfortune must be borne by his estate or his family rather than by a stranger.[6] In some cases this

5—**Young v. Stevens, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202;** Ex p. Northington, 37 Ala. 496, 79 Am. Dec. 67; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Reando v. Misplay, 60 Mo. 251, 59 Am. Rep. 13; Waldron v. Davis, 70 N. J. L. 788, 66 L. R. A. 591; Richardson v. Strong, 13 Ired. L. (N. C.) 106, 55 Am. Dec. 430; LaRue v. Gilkyson, 4 Pa. St. 375, 45 Am. Dec. 700; Lancaster County Bank v. Moore, 78 Pa. St. 407, 21 Am. Rep. 24 and note.

As to whether the services of an attorney employed to procure the release of the insane person from an asylum are within the class of "necessaries," see Re Treshour's Est., 174 Mich. 114, Ann. Cas. 1915 A 726 and note, 45 L. R. A. (N. S.) 67 and note.

See the analogous rule as to contracts of infants for necessaries, *ante*, §§ 5-7.

6—**Flach v. Gottschalk, 88 Md. 368, 71 Am. St. Rep. 418 and note,** 42 L. R. A. 745; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610; Fay v. Burditt, 81 Ind. 433, 42 Am. Dec. 142; Behrens v. McKenzie, 23 Iowa 333, 92 Am. Dec. 428; Cribben v. Maxwell, 34 Kans. 8, 55 Am. Rep. 233; Young v. Stevens, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 717; Odom v. Riddick, 104 N. C. 515, 17 Am. St. Rep. 686, 7 L. R. A. 116; Beals v. See, 10 Pa. St. 56, 49 Am. Dec. 573; Lancaster County Bank v. Moore, 78 Pa. St. 407, 21 Am. Rep. 24 and note; Sims v. McLure, 8 Rich. Eq. (S. C.) 286, 70 Am. Dec. 196; National Metal Edge Box Co. v. Vanderver, 85 Vt. 488, Ann. Cas. 1914 D 865 and note, 42 L. R. A. (N. S.) 342.

Contra, Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414.

The burden of proving the fairness of the contract and the good faith of the other party rests on the one who seeks to enforce the

exception to the general rule has been limited to cases where the contract was beneficial to the incompetent, so that he or his estate would gain an unfair advantage if it were now repudiated.[7]

Since the contract of an insane or incompetent man, whose status had not been fixed by any adjudication, is not wholly void but only voidable, it is subject to ratification by the incompetent if he be restored to reason, or by his heirs after his death.[8]

Of course mental weakness not sufficient in itself to avoid a contract may often be an important element in the proof of fraud practiced upon him by the other party.[9]

The mental capacity requisite to a valid marriage is discussed in a later chapter.[10]

§ 24. **The mental capacity required to make a will.** The power to make a will depends upon statute, and the statutes conferring that power usually include among the necessary qualifications of the testator that he be "of sound mind." But this phrase, as already pointed out, is of flexible and varied meaning, and must always be defined in the light of the topic to which it is to be applied.

contract. Hosler v. Beard, 54 Ohio St. 405, 56 Am. St. Rep. 720, 35 L. R. A. 161.

7—Northwestern Mutual Fire Insurance Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Wireback v. First National Bank, 97 Pa. St. 543, 39 Am. Rep. 821.

8—Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 717; Gibson v. Western N. Y. Railway Co., 164 Pa. St. 142, 44 Am. St. Rep. 586.

See the analogous rule in the case of infants, *ante*, §§ 15-17.

9—Sprinkle v. Wellborn, 140 N. C. 163, 111 Am. St. Rep. 827, 3 L. R. A. (N. S.) 174 and note; Jackson v. King, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354 and note; Tracey v. Sackett, 1 Ohio St. 54, 59 Am. Dec. 610.

Note to 4 L. R. A. 637.

The court in Helberg v. Schumann, 150 Ill. 12, 41 Am. St. Rep. 339, went so far as to say: "Insane persons being incapable to enter into a valid contract, all persons dealing with them with knowledge of their incapacity are regarded as perpetrating a fraud upon them."

10—See, *post*, § 38, esp. note 11.

If the question be the making of a will, the test is: was the testator, at the time of executing the alleged will, mentally capable of comprehending the nature of that transaction,—of knowing at least in a general way the property which he owned and its value, of appreciating the claims upon him of those persons who would naturally be his legatees, and of understanding the meaning and effect of the provisions which he is making. Neither old age, physical illness, failing memory or mental weakness, will render the party incapable of making a will if his mental condition is still such as to meet that test.[11]

11—**Campbell v. Campbell, 130 Ill. 466, 6 L. R. A. 167;** St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 375; Havens v. Mason, 78 Conn. 410, 3 L. R. A. (N. S.) 172 and note; Slaughter v. Heath, 127 Ga. 747, 27 L. R. A. (N. S.) 1 and note; Manatt v. Scott, 106 Iowa 203, 68 Am. St. Rep. 293; Higdon's Will, 6 J. J. Marsh. (Ky.) 444, 22 Am. Dec. 84; Whitney v. Twombly, 136 Mass. 145; Thompson v. Ish, 99 Mo. 160, 17 Am. St. Rep. 552; Cash v. Lust, 142 Mo. 630, 64 Am. St. Rep. 576; Clark v. Fisher, 1 Paige Ch. (N. Y.) 171, 19 Am. Dec. 402; Delafield v. Parish, 25 N. Y. 9; Converse v. Converse, 21 Vt. 168, 52 Am. Dec. 58; Kerr v. Lunsford, 31 W. Va. 659, 2 L. R. A. 668; McMasters v. Scriven, 85 Wisc. 162, 39 Am. St. Rep. 828

"He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them." Hall v. Perry, 87 Me. 569, 47 Am. St. Rep. 352. This formula is used in some other cases.

In Iowa it is held that "a person of sound mind is one who has full and intellectual knowledge of the act he is engaged in, a full knowledge of the property he possesses, and intelligent perception and understanding of the disposition he desires to make of it." Meeker v Meeker, 74 Iowa 352, 7 Am. St. Rep. 489. But in Burney v. Torrey, 100 Ala. 157, 46 Am. St. Rep. 33, it was held improper to require an "intelligent knowledge, intelligent perception and understanding and intelligent comprehending" of the will. So in St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 375, a request to charge that the testator must have had capacity to comprehend perfectly the condition of his property, etc., was held properly refused.

In a shocking case of dislike to his children, often brutally expressed by the testator, it was said that it is necessary "for one to have such sensibilities as will

It is sometimes said that the character of the will in question should be taken into consideration; and that a man may be mentally capable of making a will which is simple and easy of comprehension, and yet be incapable of making one which involves a very large estate, the consideration of the natural claims of a large number of relatives, or the framing of elaborate and complicated provisions.[12]

Since the making of a simple will calls for no business shrewdness or capacity for negotiation, and wills must often be made by those who are weakened by illness and perhaps disturbed by pain, a less degree of mental strength is required than to make an important contract.[13] It follows that an adjudication of incompetency to manage one's affairs, and the appointment of a guardian, is not conclusive against the testamentary capacity of the person;[14] and conversely, an adjudication that one is not insane and the denial of an application to appoint a guardian does not estop

enable him to know the obligations he owes to the natural objects of his bounty." McDonald v. McDonald, 120 Ky. 211, 117 Am. St. Rep. 579.

The entire subject of this section is discussed in the 110-page note, 27 L. R. A. (N. S.) 1, which reviews carefully all the English and American cases.

12—**Trish v. Newell, 62 Ill. 196, 14 Am. Rep. 79;** Dillman v. McDaniel, 222 Ill. 276, 113 Am. St. Rep. 400.

13—**Hall v. Perry, 87 Me. 569, 47 Am. St. Rep. 352;** Burney v. Torrey, 100 Ala. 157, 46 Am. St. Rep. 33; Comstock v. Hadlyme Eccl. Soc., 8 Conn. 264, 20 Am. Dec. 100; Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Potts v. House, 6 Ga. 325, 50 Am. Dec. 329; Meeker v. Meeker, 74 Iowa 352, 7 Am. St. Rep. 489; Speer v. Speer, 146 Iowa 6, 140 Am. St. Rep. 268, 27 L. R. A. (N. S.) 294; Waters v. Waters, 222 Ill. 26, 113 Am. St. Rep. 359; Rowcliffe v. Belson, 261 Ill. 566, Ann. Cas. 1915 A 359 and note; Maddox v. Maddox, 114 Mo. 35, 35 Am. St. Rep. 734; Kirkwood v. Gordon, 7 Rich. L. (S. C.) 474, 62 Am. Dec. 418.

Contra by statute in Maryland. Davis v. Calvert, 5 Gill. & J. (Md.) 269, 25 Am. Dec. 282.

A contrary ruling in Keithley v. Strafford, 126 Ill. 507, was overruled in Craig v. Southard, 148 Ill. 37, and Waters v. Waters, *supra.*

14—Linkmeyer v. Brandt, 107 Iowa 750; Lewis v. Jones, 50 Barb. (N. Y.) 645; Titlow v. Titlow, 54 Pa. St. 216, 93 Am. Dec. 291; Re Cowdrey, 77 Vt. 359, 3 Ann. Cas. 70.

the applicant from asserting the incapacity of the party to make a will at substantially the same time.[15]

If the testator's mental condition when the will was made was that of idiocy or general insanity, his will is void,[16] unless made in a lucid interval;[17] but if he were only partially insane, the victim of monomania or insane delusions, the test is whether his mania or delusion was of such a character as did affect, or would naturally affect, his testamentary wishes; if so, he is not, as to the making of the will, of sound mind; if not, he may still be of testamentary capacity.[18]

15—Manley v. Searles, 62 Vt. 153, 8 L. R. A. 707.

16—O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Stanton v. Wetherwax, 16 Barb. (N. Y.) 259.

"Absolute imbecility incapacitates the party from making any kind of a will, even the simplest." Campbell v. Campbell, 130 Ill. 466, 6 L. R. A. 167.

17—O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Kingsbury v. Whitaker, 32 La. Ann. 1055, 36 Am. Rep. 278; Titlow v. Titlow, 54 Pa. St. 216, 93 Am. Dec. 691; Lee v. Lee, 4 McCord (S. C.) 183, 17 Am. Dec. 722; Wright v. Lewis, 5 Rich. L. (S. C.) 212, 55 Am. Dec. 714.

18—Banks v. Goodfellow, L. R. 5 Q. B. 549, 39 L. J. Q. B. (N. S.) 237, 16 Eng. Rul. Cas. 713, overruling dicta in previous English cases. Smee v. Smee, L. R. 5 Prob. 84; Middleditch v. Williams, 45 N. J. Eq. 726, 4 L. R. A. 738; Cotton v. Ulmer, 45 Ala. 378, 6 Am. Rep. 703; Kimberly's Appeal, 68 Conn. 428, 439, 57 Am. St. Rep. 101, 37 L. R. A. 261; Orchardson v. Cofield, 171 Ill. 14, 63 Am. St. Rep. 211, 40 L. R. A. 256; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Johnson v. Johnson, 105 Md. 81, 121 Am. St. Rep. 570; Rivard v. Rivard, 109 Mich. 98, 63 Am. St. Rep. 566; Potter v. Jones, 20 Oreg. 239, 12 L. R. A. 161; Pidcock v. Potter, 68 Pa. St. 342, 8 Am. Rep. 181 and note; Taylor v. Trich, 165 Pa. St. 586, 44 Am. St. Rep. 679; Thomas v. Carter, 170 Pa. St. 272, 50 Am. St. Rep. 770; Englert v. Englert, 198 Pa. St. 326, 82 Am. St. Rep. 808.

As to the definition of "insane delusions," see section 20, note 6. And see the note as to insane delusions in regard to relatives as affecting a will, Ann. Cas. 1916 C 4.

Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81 and Lee v. Lee, 4 McCord (S. C.) 183, 17 Am. Dec. 722, are extreme cases, interesting not as precedents, but as illustrations of the extremes to which some courts have gone to support a will.

In many of the above cases the rule is stated so as to require the

The determining question is as to his capacity at the very time of execution of the will; evidence as to his acts and mental condition before and after that time may be admitted for what light it may throw upon his condition at the precise time in question.[19] To what length of time before or after the date of the will the evidence may extend is substantially a matter for the judicial discretion of the trial court.[20]

§ 25. Mental capacity as an element in the commission of a crime. There are few topics in the law on which the decisions are so absolutely contradictory as on the subject-matter of this section. Legal and medical authorities differ very radically as to what kind or degree of insanity makes one irresponsible for his criminal acts; and courts differ little less among themselves. In no field is the rational application of sound theory to particular facts more hampered by the strong current of public sentiment, which often looks on the defense of insanity as the last resort of a guilty man, and is outraged if a shocking homicide is held to be no crime because of the mental condition of the actor.

opponents of the will to prove not only that the testator had insane delusions, but that they affected the provisions of his will. It is evident that this requirement is too strict. If the delusions were such as would naturally affect a will, and the terms of the will were such as to show such possible effect, the opponents cannot reasonably be required to produce direct evidence that the testator was in fact influenced by the delusions in framing his testamentary plans. The rule is carefully and accurately stated in Banks v. Goodfellow, and Kimberly's Appeal, *supra*.

19—Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Craig v. Southard, 148 Ill. 37; Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106.

20—Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423; Davis v. Calvert, 5 Gill. and J. (Md.) 269, 25 Am. Dec. 282; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; McAllister v. Rowland, 124 Minn. 27, Ann. Cas. 1915 B 1006 and note.

Where testator died of an acute disease, and there was no evidence of mental unsoundness except the weakness produced by the disease, proof of his condition as to lethargy, suffering or unsciousness, on the days preceding and following the execution of the will, is entitled to very little weight. Speer v. Speer, 146 Iowa 6, 140 Am. St. Rep. 268, 27 L. R. A. (N. S.) 294.

The difficulty of ascertaining with certainty the real mental condition of the accused from symptoms which are often obscure and contradictory, and from conduct which may be genuine and may be feigned, and the necessity of relying largely on expert evidence which may be biased and untrustworthy, increases the difficulty of the courts in dealing with this question. Fortunately for the judges, they do not have to personally apply the tests of legal science to the complex personality of the accused; the judge has only to state to the jury the rules of law as wisely and lucidly as he can, and to give them such assistance in dealing with the facts as the local practice permits. The final verdict is based on the conclusions of twelve laymen, no two of whom may be governed by the same reasons or unreasoning sentiment. But this fact makes it all the more necessary that the judge, the adviser and instructor of the jury, shall be controlled by calm reason and seek for impartial justice.

It was said by a great judge in a celebrated case:[21] "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent and is not punishable for criminal acts. In these cases the rule of law, as we understand it, is this: A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing, a knowledge and consciousness that the act he is doing is wrong and criminal and will subject him to punishment. In order to be responsible he must have sufficient power of memory to recollect the relation in which

21—Chief Justice Shaw in Com. v. Rogers, 7 Mete. (Mass.) 500, 41 Am. Dec. 458. An excellent brief statement is to be found in Plake v. State, 121 Ind. 433, 16 Am. St. Rep. 408.

he stands to others and in which others stand to him, that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty."

This test: the mental capacity to understand that the act was wrong, is a fundamental test of criminal responsibility in all cases; and by some courts has been made the sole test.[22] But in others it is held that, although the doer of the act may have known that it was wrong and criminal, yet if he was forced to it by a desire caused by mental disease or derangement, which overrode his will and made it impossible for him to resist the insane impulse, he is an insane person and not legally punishable for the act.[23] The contention

22—The leading case establishing this as the sole test is McNaughten's case in the House of Lords in 1843, 10 Clarke and Fin. 200, 8 Eng. Rep. reprinted 718.

American cases following McNaughten's case and denying the doctrine of irresistible impulse as a defense include Peo. v. Hubert, 119 Cal. 216, 63 Am. St. Rep. 72 and note, p. 100; State v. O'Neil, 51 Kan. 651, 24 L. R. A. 555; State v. Knight, 95 Me. 467, 55 L. R. A. 373; Smith v. State, 95 Miss. 786, Ann. Cas. 1912 A 23 and note, 27 L. R. A. (N. S.) 461 and note; State v. Riddle, 245 Mo. 451, Ann. Cas. 1914 A 884, 43 L. R. A. (N. S.) 150; Hawe v. State, 11 Neb. 537, 38 Am. Rep. 375; Genz v. State, 59 N. J. L. 488, 59 Am. St. Rep. 619; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; Com. v. Wireback, 190 Pa. St. 138, 70 Am. St. Rep. 625; State v. Levelle, 34 S. C. 120, 27 Am. St. Rep. 799; State v. Harrison, 36 W. Va. 729, 18 L. R. A. 224 and note; Oborn v. State, 143 Wis. 249, 31 L. R. A. (N. S.) 966.

The New York Penal Law, section 1120, excuses only one who "at the time of committing the alleged criminal act was laboring under such a defect of reason as (1) not to know the nature and quality of the act he was doing, or (2) not to know that the act was wrong." People v. Schmidt, 216 N. Y. 324, Ann. Cas. 1916 A 978, L. R. A. 916 D 519.

A similar statute exists in Oklahoma; Maas v. Territory, 10 Okla. 714, 53 L. R. A. 814.

In People v. Schmidt, *supra*, the court held it erroneous to interpret this provision of the Penal Law so strictly as to hold that a knowledge that the act was forbidden by the law of the state was sufficient to make the accused responsible. The case holds that if one had a real insane delusion that God had commanded him to kill a certain person, and acted under the influence of that belief, he is not criminally responsible.

23—**Parsons v. State, 81 Ala.**

between these two views has been very sharp.

Kleptomania, dipsomania and pyromania[24] are species of irresistible impulse to commit particular crimes; but the most frequent class of such cases is that of homicidal mania.

Another sharp conflict exists over the effect on one's responsibility for crime of the fact that he was led to commit the act by an insane delusion. Many courts have laid down the rule that one who acts under such a delusion should be judged as if the things which he imagined to be true were really true; and if they would constitute no justification or mitigation even if true, the insane belief in them constitutes no defense.[25] This ruling has a superficial plausibility; but it seems to involve the rather violent assumption that one who is obsessed by some delusion, usually of a sensational and exciting kind, the product of mental derangement, as to which he is impervious either to evidence or argument, can justly be required to reason as soundly and prudently in relation to that figment of his imagination as does the normal man in regard to actual and normal facts. Some courts

577, 60 Am. Rep. 193; Mutual Life Insurance Co. v. Terry, 15 Wall. (U. S.) 580 (a civil case); Hawkins v. State, — Ark. —, L. R. A. 1918 D 784 and note; Plake v. State, 121 Ind. 433, 16 Am. St. Rep. 408; Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; State v. Peel, 23 Mont. 358, 75 Am. St. Rep. 529.

In State v. Mewhinney, 43 Utah 135, Ann. Cas. 1916 C 537, L. R. A. 1916 D 590, the defense of irresistible impulse is supported by the opinion of the court, although held not applicable under the facts of that case.

See the extended notes on the doctrine of irresistible impulse, Ann. Cas. 1912 A 23, Ann. Cas. 1917 C 609, 18 L. R. A. 224, 27 L. R. A. (N. S.) 461.

24—See section 20, notes 7, 8 and 9.

25—People v. Hubert, 119 Cal. 216, 63 Am. St. Rep. 72 and note, p. 104.

Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, does not clearly adopt this rule of decision, though it assumes it to be the decisive text.

As to the effect of an insane delusion that God had commanded the criminal act, see the elaborate discussion in Peo. v. Schmidt, 216 N. Y. 324, Ann. Cas. 1916 A 978, L. R. A. 1916 D 519; and see also the charge to the jury in the celebrated Guiteau case, 10 Fed. 161.

have therefore emphatically denied the soundness of the above test.[26]

In some cases the courts have held it impossible to give the jury exact instructions as to the kind and degree of insanity that would render the victim irresponsible and have referred to the jury the broad question "whether the defendant had a mental disease, and whether the act was the product of such disease."[27]

In many cases defending counsel, unable to bring their clients within any of the classes already mentioned, have sought to persuade the courts to recognize a so-called emotional insanity; that is, a state of furious anger or other passion so violent as for the time being to dethrone the reason and judgment and sweep away all power of resisting the impulse to commit a homicide or other crime. The distinction between this attempted defense and that of irresistible impulse is that the latter involves the actual existence of mental disease, while in the former the fury is the mere temporary product of passion. That such emotional insanity constitutes a defense has been universally denied by the courts.[28] But, although the mental condition of the prisoner

26—**Ryan v. People, 60 Colo. 425, Ann. Cas. 1917 C 605 and note, L. R. A. 1917 F 646 and note;** Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193; State v. Keerl, 29 Mont. 508, 101 Am. St. Rep. 579; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242.

27—**State v. Jones, 50 N. H. 369, 9 Am. Rep. 424;** Ryan v. People, 60 Colo. 425, Ann. Cas. 1917 C 605, L. R. A. 1917 F 646.

It was said in the charge to the jury in the Guiteau case, 10 Fed. 161, 166, in discussing the effect of an insane delusion: "It must appear that the crime charged was the product of the delusion or other morbid condition, and connected with it as effect with cause, and not the result of sane reasoning or natural motives, which the party may be capable of notwithstanding his circumscribed disorder."

28—**State v. Lauth, 46 Oreg. 342, 114 Am. St. Rep. 873;** Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360; Jacobs v. Com., 121 Pa. St. 586, 6 Am. St. Rep. 802; Com. v. Renzo, 216 Pa. St. 147.

"If the lack of will power is the result of a diseased state of the mind, there is mental unsound-

is due to his own fault in habitually yielding to anger, passion or alcoholic indulgence, if he has in fact become insane, he ceases to be criminally responsible for his acts.[29]

The burden of proof as to sanity or insanity in a criminal prosecution has been discussed in a previous section.[30]

The question of mental competency is a part of the issue to be tried by the jury in every criminal prosecution, if insanity is claimed, and if evidence is offered to overcome the presumption of sanity. The legislature of the State of Washington lately passed an act declaring sanity to be no defense to a criminal prosecution, but requiring the trial judge, if in his opinion the accused was insane either at the time of committing the crime or of his trial, to order him confined in an institution for the insane or in the insane ward of the penitentiary until he should have recovered his sanity. The judge was authorized to make such examination of the accused and employ such expert advice as he should deem fit. This statute was held unconstitutional, as denying to the party claiming insanity both due process of law and the right of trial by jury.[31]

The question of one's mental competency to participate in a criminal act may sometimes arise when the person is the victim rather than the perpetrator of the crime, but in these cases the test of mental competency is substantially the same. Thus, if the victim of a rape had not sufficient mind

ness within the meaning of the law; but if the will is simply overborne by ungoverned passion, there may be criminal responsibility." Plake v. State, 121 Ind. 435, 16 Am. St. Rep. 408.

See the careful and extended discussion of the distinction between an impulse to commit a crime caused by mental disease or insane delusion and that produced by a depraved ambition and desire for notoriety in the Guiteau case, 10 Fed. 161.

See also the note, Ann. Cas. 1912 A 40, for a full discussion.

29—Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Duthey v. State, 131 Wis. 178, 10 L. R. A. (N. S.) 1032.

30—See, *ante*, § 21, note 6.

31—State v. Strasburg, 60 Wash. 106, Ann. Cas. 1912 B 917, L. R. A. (N. S.) 1216.

See the similar questions discussed in § 21, notes 12 to 16.

to comprehend the nature of the act, and that it was wrong, her consent is no defense, at least if her mental weakness was known to the accused.[32] And adultery, cruelty or desertion, by a husband or wife unable to understand the wrongful nature of their conduct by reason of mental disease, does not entitle the other party to a divorce.[33]

§ 26. **Torts of or relative to insane persons.** To the committing of a crime the criminal intent of the actor is an essential element; and therefore his mental capacity to form such intent must exist. But a judgment for damages in a tort action is given not to punish a wicked act, but to remove the burden of a loss from him upon whom it casually fell, upon the one whose act caused it, and in most cases the intention of the tortfeasor is immaterial. It is the general rule, therefore, that the insanity of one who has committed a tort is no defense to a civil action therefor.[34]

32—**Gore v. State, 119 Ga. 418, 100 Am. St. Rep. 182;** Peo. v. Croswell, 13 Mich. 427, 87 Am. Dec. 774; State v. Warren, 232 Mo. 185, Ann. Cas. 1912 B 1043 and note.

In Peo. v. Griffin, 117 Cal. 583, 59 Am. St. Rep. 216, the court deny that ignorance of her mental weakness excuses the defendant, saying: "It can scarcely happen that one seeking illicit intercourse with a woman of weakened intellect will not know that fact. If he indulges in niceties as to whether or not she be just so far mentally infirm as to save him from criminal consequences, and so pursues his purpose, he does so at his peril."

33—As to adultery, see Wray v. Wray, 19 Ala. 522; Broadstreet v. Broadstreet, 7 Mass. 474; Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352. Matchin v. Matchin, 6 Pa. St. 332, 47 Am. Dec. 466 and note, is *contra*, but is opposed by the overwhelming weight of American authority as shown by the note. The Probate Division in England left it undecided in 1892 whether adultery by an insane woman was ground for divorce. Farrow v. Farrow (1892) Pr. 92.

As to desertion, see Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 129 Am. St. Rep. 708, 16 L. R. A. (N. S.) 1071; Messick v. Messick, 177 Ky. 337, L. R. A. 1918 A. 1184; Wright v. Wright, 99 S. E. 515 (Va.), 4 A. L. R. 1331 and note.

As to cruelty, see Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774. And as to all three see the full note, 34 L. R. A. 162-6.

34—**McIntyre v. Sholty, 121 Ill. 660, 2 Am. St. Rep. 140;** Holdom v. Grand Lodge United Workmen, 159 Ill. 619, 50 Am. St. Rep. 183, 31 L. R. A. 67; Morain v. Devlin,

There is no distinction in this respect between torts of misfeasance and of nonfeasance, between trespasses and acts of negligence.[35] The law requires every person to exercise, in whatever activities he undertakes, the care of an ordinarily prudent man; and if he is not able to measure up to this standard the misfortune is his, and the resulting loss, if any, must be borne by him or his estate rather than by the casual victim who was wholly free from default.

But in measuring the care which any person must use in his conduct toward another, if that other person was of feeble or disordered mind, and that fact were known to the actor, he will be held to use greater care toward him than toward normal persons. The situation is similar to that when the person toward whom care is required to be exercised is a child, but with this important difference: if it be a child his youth and the consequent necessity of special care will ordinarily be apparent to the other party; but if the person be an adult who is insane that fact will probably not appear to the other party by mere observation, and therefore actual knowledge is necessary in order to charge him with the necessity of exercising unusual care.

This rule has sometimes become important in cases where a railway passenger had become, and showed himself to be, insane. The railway company must bestow upon one in such condition any special care and attention beyond that

132 Mass. 87, 42 Am. Rep. 423; Moore v. Horne, 153 N. C. 413, 138 Am St. Rep. 675, 21 Ann. Cas. 1350 and note; Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349.

35—**Williams v. Hays, 143 N. Y. 442, 42 Am. St. Rep. 743, 26 L. R. A. 153.**

The strong and unqualified statement in this case was doubted in the later decision in the same case, 157 N. Y. 541, 68 Am. St. Rep. 797, 43 L. R. A. 253, which held that when the master of a ship had become utterly exhausted by three days' constant labor to save his ship in a storm, and was rendered insane by the mental and physical strain, his consequent recklessness and neglect were not an actionable tort. They were rather the direct result of the violence of the storm.

Central of Ga. R. Co. v. Hall, 124 Ga. 322, 110 Am. St. Rep. 170, 4 Ann. Cas. 128, 4 L. R. A. (N. S.) 898.

given to the ordinary passenger which reasonable prudence and foresight demands for his safety, considering any manner of conduct or disposition of mind manifested by the passenger and known to the company, or any conduct or disposition that might have been reasonably anticipated from one in his mental and physical condition, which would tend to increase the danger to himself or others. If its servants, knowing the facts, fail to give such care and attention, and injury results as the natural and probable consequence of such failure, the company will be guilty of negligence, and liable in damages for such injury.[36]

It seems to result roughly, therefore, that mental incompetency of the defendant is usually disregarded in judging the carefulness or negligence of his conduct, but that that of the plaintiff, if known to the defendant, is important.[37]

But in actions for a tort of which malice is an essential element, insanity of the defendant, either complete or in respect to the matter out of which the tort arises, is a defense. This has been held to apply generally in actions for libel and slander;[38] but other and apparently sounder cases hold that insanity is a complete defense only in cases of qualified privilege, where express malice must be proved,[39] and that in other cases evidence of insanity is admissible only to mitigate the damages by eliminating any claim for vindictive damages, or by showing that the statements made by the defendant could not have seriously injured the plaintiff because of the known irresponsibility of the defendant.[40]

To hold the insane tortfeasor responsible, the tort must

36—Weirling v. St. Louis, etc., R. Co., 115 Ark. 505, Ann. Cas. 1916 E 253 and note.

37—Worthington v. Mencer, 96 Ala. 310, 17 L. R. A. 407.

38—Irvine v. Gibson, 117 Ky. 306, 111 Am. St. Rep. 251, 4 Ann. Cas. 569 and note; Bryant v. Jackson, 6 Humph. (Tenn.) 199; Horner v. Marshall, 5 Munf. (Va.) 466.

39—Ullrich v. N. Y. Press Co., 23 Misc. (N. Y.) 168.

40—Yeates v. Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; Dickinson v. Barber, 9 Mass. 225, 9 Am. Dec. 58 and note.

have been committed by himself, by his direction, or under his immediate view. He cannot be held liable for the torts of a servant committed in the course of his employment, but not in his presence or by his direction; since such liability rests primarily upon the contract of employment.[41]

Nor is an employer liable for a tort committed by his servant, if the act was caused by the insanity of the servant, and the master had no knowledge of the insanity and was free from fault in employing the servant.[42] If, however, the employer was a common carrier of goods, and so responsible as an insurer except for "the act of God," he is liable for injury done even by an insane employee, since that term, as an exception to the liability of a common carrier, applies only to the extraordinary violence of nature and excludes human agency.[43]

Since the liability of an insane person for a tort rests on the fact that the judgment is not to punish him, but simply to compensate the victim for his loss, vindictive damages are never allowable in an action for the tort of an insane person.[44]

The rule as to the effect of insanity upon a tortious act when relied on as a defense by way of forfeiture or estoppel is different. The idea of a blamable wrong seems to inhere in the theory of forfeiture. Therefore if the beneficiary in a life insurance policy kills the insured, his right to recover on the policy is not forfeited if he was insane at the time of the homicide;[45] and if the insured kills himself while insane,

41—Gillett v. Shaw, 117 Md. 508, 42 L. R. A. (N. S.) 87.

See the analogous rule as to an infant, *ante*, section 18, note 95.

42—Central of Ga. R. Co. v. Hall, 124 Ga. 322, 110 Am. St. Rep. 170, 4 Ann. Cas. 128, 4 L. R. A. (N. S.) 898.

43—Central of Ga. R. Co. v. Hall, *supra*.

And see Chesapeake & Ohio R. Co. v. Francisco, 149 Ky. 307, 42 L. R. A. (N. S.) 84, as to carriers of persons.

44—McIntyre v. Sholty, 121 Ill. 660, 2 Am. St. Rep. 140; Moore v. Horne, 153 N. C. 413, 138 Am. St. Rep. 675, 21 Ann. Cas. 1350.

45—Holdom v. Grand Lodge United Workmen, 159 Ill. 619, 50 Am. St. Rep. 183, 31 L. R. A. 67.

the clause excepting suicide from the risk assumed does not apply, unless suicide while insane is expressly excluded by the terms of the policy.[46]

The parent or guardian of an insane person, or any other person who may have him in his care and custody, is not liable for torts committed by the insane person, unless his condition of mind was such that the guardian knew, or in the exercise of ordinary care should have known, that he might be dangerous to the safety of others. In that case, if the custodian neglected to take precautions required by ordinary prudence, and in consequence the insane person did injury to person or property, the custodian is liable, not for the tort of the insane person, but for his own negligence.[47]

§ 27. **Actions by or against insane persons.** When an action is pending or requires to be brought, and it appears that the plaintiff is insane, or mentally incapable of conducting the action, there is a peculiar need for the exercise of that duty which rests upon all courts to assist those who are

46—**Mutual Life Insurance Co. v. Terry, 15 Wall. (U. S.) 580;** Conn. Mutual Life Insurance Co. v. Akens, 150 U. S. 468; Grand Lodge v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123; Blackstone v. Standard Life Insurance Co., 74 Mich. 592, 3 L. R. A. 486; Schultz v. Insurance Co., 40 Ohio St. 217, 48 Am. Rep. 676; Conn. Mutual Life Insurance Co. v. Groom, 86 Pa. St. 92, 27 Am. Rep. 689; Phadenhauer v. Germania Life Insurance Co., 7 Heisk (Tenn.) 567, 19 Am. Rep. 623.

It has also been held that the right of a benefit society to make reasonable alterations of its by-laws and to apply them to existing policy-holders extends to eliminating liability for suicide when sane, but not for suicide when insane. Supreme Council Heptasophs v. Rehan, 119 Md. 92, Ann. Cas. 1914 D 58, 46 L. R. A. (N. S.) 308.

47—Whiteside v. Wheeler, 158 Ky. 121, Ann. Cas. 1915 D 223 and note.

It was held not to be negligence forfeiting the right to recover on a fire insurance policy that the insured left his insane wife alone in the house, where she had given no prior evidence of a tendency to injure herself or any property. Gove v. Farmers Mutual Insurance Co., 48 N. H. 41, 97 Am. Dec. 572.

See the analogous liability of parents for negligence in controlling their infant children, *post*, section 128, note 42.

not able to act for themselves in the procuring of justice. The mode in which that assistance is to be given depends on the local statute or practice.

If the incompetency of the plaintiff or the proposed plaintiff had been declared by the proper court and a guardian appointed for him, it is the duty of that guardian to institute or prosecute, usually in the name of the ward, any suits needed for his protection or the assertion of his rights.[48] But if no guardian has been appointed, and the fact of incompetency has not been adjudicated, it may be the duty of the trial court to itself determine that fact, in whatever way the question may have come to its notice and, if it seems to be necessary, to appoint a guardian *ad litem* or next friend to carry on or institute the required litigation.[49] It is therefore error to dismiss a suit upon a plea or answer merely asserting that the plaintiff is insane.[50] Even if the plaintiff should himself appear by attorney, disclaim the action of his next friend, and ask the dismissal of the suit, the court should not dismiss it without ascertaining his actual mental condition and, if he is found incompe-

48—Covington v. Neftzger, 140 Ill. 608, 33 Am. St. Rep. 261; Chevannes v. Priestly, 80 Iowa 316, 9 L. R. A. 193; Lombard v. Morse, 155 Mass. 136, 14 L. R. A. 273; Sims v. Sims, 121 N. C. 297, 61 Am. St. Rep. 665, 40 L. R. A. 737; Houseman v. Home Insurance Company, 78 W. Va. 203, L. R. A. 1917 A 299. The 21-page note, 64 L. R. A. 513, discusses at length the entire topic of suits in behalf of an insane person.

49—**Isle v. Cranby, 199 Ill. 39, 64 L. R. A. 513 and note,** overruling Covington v. Neftzger, *supra*, on this point; Dunphy v. Dunphy, 161 Cal. 380, Ann. Cas. 1913 B 1230, 38 L. R. A. (N. S.) 818; Plympton v. Hall, 55 Minn. 22, 21 L. R. A. 675.

Although the language of the statute is that the court "may appoint" a guardian *ad litem* to sue, it is not a matter of mere discretion in the trial court, but if a clear violation of the rights of the insane person is alleged, and a proper person applies for appointment to prosecute the action, it must make the appointment. State ex rel. Happe v. District Court, 38 Mont. 166, 129 Am. St. Rep. 636, 35 L. R. A. (N. S.) 1098.

50—Wiesmann v. Donald, 125 Wis. 600, 2 L. R. A. (N. S.) 961 and note.

tent to decide for himself, determining which representative is really acting in his interest.[51]

If the plaintiff is merely weak and feeble minded, and is properly represented by counsel, no action is needed; but the court will intervene and appoint a guardian whenever it appears to be necessary.[52]

The special requirements of a particular action may alter the rule; thus if a bastardy action is required to be begun by complaint signed and sworn to by the mother of the child, and that was done in form, if it afterward appears that she was an imbecile, unable to understand the proceedings or the nature of an oath, the action must be dismissed.[53] And it has been held that the guardian of an insane wife cannot sue for divorce in her behalf, as the right to claim release from the marriage is personal to the aggrieved spouse.[54]

In the absence of any contrary statute or practice, any person may volunteer to bring the action, as in the analogous case of suit in behalf of an infant; but the court has broad and summary power to supersede the volunteer by a guardian of its own appointment when, in its just discretion, it finds that course required in the plaintiff's interest.[55] The next friend assumes primary responsibility for the expenses and costs of the suit, but is entitled to be compensated from the estate of the incompetent if he acted prudently and in good faith, although the action may have been unsuccessful.[56]

If one desires to sue a person who has been adjudged

51—Isle v. Cranby, 199 Ill. 39, 64 L. R. A. 513.

52—Mentz v. Beebe, 95 Wis. 383, 60 Am. St. Rep. 120.

53—State ex rel. Yilek v. Jehlik, 66 Kan. 301, 61 L. R. A. 265.

54—Worthy v. Worthy, 36 Ga. 45, 91 Am. Dec. 758; Mohler v. Shank, 93 Iowa 273, 57 Am. St. Rep. 274, 34 L. R. A. 161 and note, citing other cases to the same effect.

But see Sims v. Sims, 121 N. C. 297, 61 Am. St. Rep. 665, 40 L. R. A. 737.

55—King v. McLean Asylum, 21 U. S. App. 481, 64 Fed. 331, 26 L. R. A. 874.

See *ante*, § 19, note 98.

56—Nance v. Stockburger, 112 Ga. 90, 81 Am. St. Rep. 22.

incompetent, he must make the guardian or conservator a party, or make service upon him in addition to the service on the ward, according to the local statute or practice.[57] But if there has been no such adjudication the plaintiff is not bound to ascertain the mental capacity of the defendant and procure a conservator to be appointed before he can bring suit.[58]

It follows that the insanity of the defendant does not of itself make a judgment rendered against him void.[59] Of course it might be an important evidential fact, if fraud in obtaining the judgment were charged;[60] and it might be ground for opening the judgment and granting a new trial, if it were also shown that the incompetent had a valid defense, or reasonable claim of defense, which he failed to present because of his disability.

It is essential to the validity of the judgment that legal service should have been made upon the defendant, though he is insane; and if the lack of service does not appear upon record, a bill will lie to set aside the judgment upon proof of that fact.[61]

57—In L'Amoureux v. Crosby, 2 Paige Ch. (N. Y.) 422, 22 Am. Dec. 655, it was held that to knowingly sue an insane person for whom a guardian had been appointed in chancery, without notice to the guardian, and procure a judgment without his knowledge, was contempt of the appointing court, and that the judgment was void. "If the court had been applied to in a summary way, the defendant would have been punished for the contempt and compelled to discharge the judgment."

58—**King v. Robinson, 33 Me. 114, 54 Am. Dec. 614;** Maloney v. Dewey, 127 Ill. 395, 11 Am. St. Rep. 131.

59—Woods v. Brown, 93 Ind. 64, 47 Am. Rep. 369; King v. Robinson, 33 Me. 114, 54 Am. Dec. 614; Stigers v. Brent, 50 Md. 214, 33 Am. Rep. 317; Bensieck v. Cook, 110 Mo. 173, 33 Am. St. Rep. 422; Henderson v. Mitchell, 1 Bailey Eq. (S. C.) 113, 21 Am. Dec. 526. *Contra*, Leach v. Marsh, 47 Me. 548, 74 Am. Dec. 503.

60—Litchfield's Appeal, 28 Conn. 127, 73 Am. Dec. 662; Wirth v. Wiegand, 85 Neb. 115, 35 L. R. A. (N. S.) 110.

61—State ex rel. Happe v. District Court, 38 Mont. 166, 129 Am. St. Rep. 636, 35 L. R. A. (N. S.) 1098.

It was held in Redmond v. Peterson, 102 Cal. 595, 41 Am. St. Rep. 204, that the general guard-

Whenever the court learns that the defendant in a case pending before it is insane or incompetent to make defense, and is not properly represented by a guardian or attorney, it should designate an attorney or appoint a guardian *ad litem* to make proper defense for him.[62]

ian can waive service on his ward, and appear for him. But the appointment and appearance of a guardian *ad litem* appointed by the court, no service having been made on the incompetent, is void for want of jurisdiction.

62—Ex p. Northington, 37 Ala. 496, 79 Am. Dec. 67.

CHAPTER IV

INSANE AND INCOMPETENT PERSONS

III. DRUNKENNESS.

§ 28. Drunkenness as affecting legal responsibility. The courts have always been reluctant to recognize intoxication as an excuse either for committing a crime or for repudiating a contract; but if from long continued intemperate habits a man has become actually insane[1] or incompetent,[2] his actual mental condition will be the determining fact rather than the cause which produced it.

1—**State v. Kidwell, 62 W. Va. 466, 13 L. R. A. (N. S.) 1024 and note;** United States v. Drew, 5 Mason (U. S. C. Ct.) 28, per Story, J.; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; State v. Driggers, 84 S. C. 526, 137 Am. St. Rep. 855, 19 Ann. Cas. 1166 and note.

The actual mental disease known as delirium tremens, though temporary in its nature and caused by excessive use of alcohol, is to be distinguished from the mere frenzy produced for the time being by a violent fit of drunkenness. United State v. McGlue, 1 Curtis (U. S. C. Ct.) 1; State v. Kraemer, 49 La. Ann. 766, 62 Am. St. Rep. 664; Cheadle v. State, 11 Okla. Cr. 566, L. R. A. 1915 E 1031; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Evers v. State, 31 Tex. Cr. 317, 37 Am. St. Rep. 811, 18 L. R. A. 421; State v. Kidwell, 62 W. Va. 466, 13 L. R. A. (N. S.) 1024.

But that the desire to drink had become a disease which the victim could not resist does not make his intoxication an excuse for homicide. Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556; and see the note, 19 Ann. Cas. 1172.

In many states statutes have been passed providing for the committment of inebriates or drug addicts to institutions for their confinement or cure. As to the constitutionality and construction of these statutes, and the procedure required for valid committment under them, see Leavitt v. Morris, 105 Minn. 170, 15 Ann. Cas. 961 and note, 17 L. R. A. (N. S.) 984 and note; Addis v. Applegate, 171 Iowa 150, Ann. Cas. 1917 E 332 and note.

2—Burnham v. Burnham, 119 Wisc. 509, 100 Am. St. Rep. 895.

But even the temporary loss of reason produced by intoxication may render one incapable of making a valid contract, and the test will be that general test often already stated: was he at the time of making the contract capable of understanding the act in which he was engaged, and the meaning and effect of the agreement which he signed or assented to. If not, there is no meeting of minds, for the mind of one party was lacking.[3] It is not sufficient that he was under the influence of liquor to such an extent as to materially affect his judgment.[4]

It is evident also that the other party to the contract could hardly deal with a man grossly intoxicated without knowing his condition; so that in most cases the element of fraud is also involved, and the contract may be declared invalid either for lack of contractual capacity on the part of one party, or for fraud of the other party in taking advantage of his condition.[5] A more extreme case of fraud is

A drunkard is not an incompetent, like an idiot or one generally insane. He is simply incompetent upon proof that, at the time of the act, his understanding was clouded or his reason dethroned by actual intoxication. Wright v. Fisher, 65 Mich. 275, 8 Am. St. Rep. 886.

But where the statute provides that a habitual drunkard may be declared incompetent, and a committee appointed to manage his affairs, that adjudication *ipso facto* terminates his contractual capacity, and a contract thereafter made by him is void, though he was sober when he made the contract, and the other party did not know of the adjudication.

Wadsworth v. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499.

3—**Wright v. Walker, 127 Ala. 557, 54 L. R. A. 440 and extended note:** Johnson v. Harmon, 94 U. S. 371; Martin v. Harsh, 231 Ill. 384, 13 L. R. A. (N. S.) 1000; Kuhlman v. Wieben, 129 Iowa 188, 2 L. R. A. (N. S.) 666 and note; J. I. Case Threshing Machine Co. v. Meyers, 78 Neb. 685, 9 L. R. A. (N. S.) 970; Burroughs v. Richman, 13 N. J. L. 233, 23 Am. Dec. 717; Cameron-Backley Co. v. Thornton Co., 138 N. C. 365, 107 Am. St. Rep. 532; Coody v. Coody, 39 Okla. 719, L. R. A. 1915 E 465; Bush v. Breinig, 113 Pa. St. 310, 57 Am. Rep. 469; Wade v. Colvert, 2 Mill (S. C.) 27, 12 Am. Dec. 652 and note; Barrett v. Buxton, 2 Aik. (Vt.) 167, 16 Am. Dec. 691.

4—Cook v. Bagnell Timber Co., 78 Ark. 47, 8 Ann. Cas. 451 and note.

5—Miller v. Sterringer, 66 W. Va. 169, 25 L. R. A. (N. S.) 596 and note; Thackrah v. Haas, 119

presented where one party brought about the intoxication of the other in order to procure his signature or assent to a contract.[6]

But either objection to the contract renders it voidable rather than void; and if the intoxicated party, after he becomes sober and knows of the contract, ratifies it,[7] or fails to repudiate it and restore the consideration, if any, within a reasonable time,[8] it becomes binding upon him.

Evidence as to the testator's intoxication at the time of executing a will, or of his habitual intemperate habits, is often admissible in will contests. It is important, however, not because there is any especial rule of law as to the testamentary capacity of intoxicated or incompetent persons, but to enable the jury to determine whether, at the time of executing the will, the testator was of the degree of mental capacity already stated.[9] Even where long continued intemperance, resulting occasionally in temporary insanity, is shown, there is no presumption that incapacitating drunkenness existed at the time of making the will. Such a condition at that time must affirmatively appear, or the presumption of capacity will prevail.[10]

U. S. 499; Swan v. Talbot, 52 Cal. 142, 17 L. R. A. (N. S.) 1066 and note.

And see the note 54 L. R. A. 443-8.

6—Newell v. Fisher, 11 Sm. & Marsh. (Ky.) 431, 49 Am. Dec. 66; Miller v. Sterringer, 66 W. Va. 169, 25 L. R. A. (N. S.) 596 and note.

A Georgia statute provides: "If the party contracting was at all instrumental in producing the state of intoxication, the contract is invalid, however partial the intoxication may be." Abbeville Trading Co. v. Butler, 3 Ga. Ap. 138.

7—Carpenter v. Rodgers, 61 Mich. 384, 1 Am. St. Rep. 595. And see the notes, 12 Am. Dec. 653, and 54 L. R. A. 448.

8—J. I. Case Threshing Machine Co. v. Meyers, 78 Neb. 685, 9 L. R. A. (N. S.) 970; Strickland v. Parlin Co., 118 Ga. 213; Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; Matz v. Martinson, 127 Minn. 262, L. R. A. 1915 B 1121 and note; Fowler v. Meadow Brook Water Co., 208 Pa. St. 473.

9—Pierce v. Pierce, 38 Mich. 412; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220. And see, *ante*, section 24.

10—Re Lee's Will, 46 N. J. Eq. 193; Koegel v. Egner, 54 N. J. Eq. 623; Lewis v. Jones, 50 Barb.

The courts have been still more reluctant to admit intoxication as an excuse for criminal acts. Indeed it has sometimes been said that the intoxication of the accused aggravated rather than mitigated his crime.[11] A less questionable statement is that, if intoxication were recognized as a mitigating feature, cunning men planning to commit a crime might ply themselves with liquor, both to stimulate their courage and to provide a defense in case of detection.[12] Again it has been said that one who voluntarily deprives himself of self-control must be held to intend, and is responsible for, the consequences.[13] For one or all of these reasons it is universally held that one who voluntarily became intoxicated, although he did so with no purpose to commit a crime when intoxicated, cannot claim immunity from criminal responsibility, or even a mitigation of the penalty,[14] though he was so intoxicated as to have no capacity to distinguish between right and wrong.[15]

But in some cases a specific intent or state of mind is an element in the crime, and if the intent is disproved by the man's intoxicated condition that particular crime cannot have been committed. Thus, since burglary is the entering a house with the intent to commit a felony therein, one who blunders into a strange house because too drunk to know where he is or what he is doing has not committed the crime of burglary.[16] So one who carries off property of another

(N. Y.) 645; Gardner v. Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340.

11—Beverly's Case, 4 Coke, 125a.

12—Shannahan v. Com., 8 Bush (Ky.) 436, 8 Am. Rep. 465; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 262.

13—People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; People v. Rodgers, 18 N. Y. 9, 72 Am. Dec. 484.

14—Springfield v. State, 96 Ala. 81, 38 Am. St. Rep. 85; Harris v. United States, 8 D. C. App. 20, 36 L. R. A. 465; People v. Rodgers, 18 N. Y. 9, 72 Am. Dec. 484; State v. John, 8 Ired. L. (N. C.) 330, 49 Am. Dec. 396.

Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493, and Latimer v. State, 55 Neb. 609, 70 Am. St. Rep. 403, state the law in a way more favorably to the accused.

15—State v. Rumble, 81 Kan. 16, 25 L. R. A. (N. S.) 376 and note.

16—People v. Phelan, 93 Cal. 111; State v. Bell, 29 Iowa 316.

through mere drunken ignorance of what he is doing does not commit larceny, which involves the intent to convert the property to the taker's own use.[17] And the same rule may apply to one charged with assault with intent to kill[18] or ravish,[19] or with passing a counterfeit bill, if the evidence shows that he was too drunk to know the difference between good and bad money or to form an intent to defraud;[20] or to one charged with conspiracy to commit murder, if he was too drunk to enter into any such agreement.[21]

But the most frequent application of this principle is in distinguishing between the degrees of murder. Murder in the first degree, as commonly defined in the American statutes, includes only murder committed with wilful and deliberate premeditation. By its general definition it excludes homicide committed by one in a drunken frenzy, or too much intoxicated to form such a deliberate intent as the statute intends,[22] unless the plan to commit the murder had already

17—**State v. Koerner, 8 N. D. 292, 73 Am. St. Rep. 752;** Wood v. State, 34 Ark. 341, 36 Am. Rep. 13; Ryan v. United States, 26 D. C. Ap. 74, 6 Ann. Cas. 636 and note; Loza v. State, 1 Tex. Ap. 488, 28 Am. Rep. 416.

Contra, Dawson v. State, 16 Ind. 428, 79 Am. Dec. 439.

18—Chrisman v. State, 54 Ark. 283, 26 Am. St. Rep. 44; Chowning v. State, 91 Ark. 503, 18 Ann. Cas. 529 and note.

19—Reagan v. State, 28 Tex. Ap. 227, 19 Am. St. Rep. 833.

20—Pigman v. State, 14 Ohio 555, 45 Am. Dec. 558.

21—**Booher v. State, 156 Ind. 435, 54 L. R. A. 391.**

22—**Aszman v. State, 123 Ind. 347, 8 L. R. A. 43;** Hopt v. People, 104 U. S. 631; Garner v. State, 28 Fla. 113, 29 Am. St. Rep. 232; State v. Rumble, 81 Kan. 16, 25 L. R. A. (N. S.) 376 and note; State v. Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293; State v. Cooley, 19 N. Mex. 91, 52 L. R. A. (N. S.) 230 and note; Cheadle v. State, 11 Okla. Cr. 566, L. R. A. 1015 E 1031.

People v. Rodgers, 18 N. Y. 9, 72 Am. Dec. 484, denies this exception and holds that one may be convicted of murder or any other crime, though his mind be reduced by drunkenness to a condition which would have called for an acquittal, if it had arisen from any other cause. "If a man makes himself voluntarily drunk, that is no excuse for any crime he may commit when he is so."

Warner v. State, 56 N. J. L. 686, 44 Am. St. Rep. 415, also denies this exception, but is based on a

been formed, and the accused deliberately became intoxicated for the purpose.[23]

As to liability for a tort, it is evident that if insanity is no defense, *a fortiori* voluntary intoxication cannot afford any justification. One who knowingly reduces himself to a condition where he cannot exercise reason or control his acts has no claim to be excused from responsibility for any injuries to person or property which may result. In fact the intoxication of the defendant is often admissible in evidence by the plaintiff as increasing the probability of his having committed the alleged tort.[24] This sometimes applies to an action for negligence of the defendant, when the fact that he was intoxicated will strengthen the testimony of his negligent conduct,[25] but more often in cases where contributory negligence is asserted against the plaintiff.[26]

But if one is visibly intoxicated, it is the duty of those who come in contact with him to take his condition into account, and their use of due care will be judged in view of that fact. Even if the drunken person and the other are both negligent, the sober party may be liable under the doctrine of the last clear chance, if he fails to exercise toward

definition of murder in the first degree which requires only an actual intent to kill.

The Texas statute limits this exception to cases of temporary insanity. Evers v. State, 31 Tex. Cr. 318, 37 Am. St. Rep. 811, 18 L. R. A. 421.

Keenan v. Com., 44 Pa. St. 55, 84 Am. Dec. 414, also practically denies this exception.

23—State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; Marshall v. Com., 141 Ky. 222, 31 L. R. A. (N. S.) 379; State v. Kidwell, 62 W. Va. 466, 13 L. R. A. (N. S.) 1024 and note.

24—Bagley v. Mason, 69 Vt. 175.

25—McIntosh v. Standard Oil Co., 89 Kan. 289, Ann. Cas. 1914 D 112, 47 L. R. A. (N. S.) 730; Powell v. Berry, 145 Ga. 696, L. R. A. 1917 A 306, with note concerning intoxication of the driver of an automobile.

See the extended notes concerning intoxication as affecting negligence, 40 L. R. A. 131-149, 47 L. R. A. (N. S.) 730-742.

26—Little Rock R. Co. v. Billings, 173 Fed. 903, 19 Ann. Cas. 1173 and note; McIntosh v. Standard Oil Co., 89 Kan. 289, Ann. Cas. 1914 D 112 and note, 47 L. R. A. (N. S.) 730.

the drunken man the degree of care which is evidently required to avoid injuring him.[27] Especially is a common carrier, in dealing with a passenger who is on its car in an intoxicated condition, bound to take his helpless condition into account in removing him from the car or otherwise handling him, and not put him in a place of manifest danger to one in his condition.[28]

It has also been held that the intoxication of one who uttered a slander may be admissible in mitigation of the damages, as the utterances of a drunken man could not seriously impair the reputation of the plaintiff.[29]

27—See the cases collected in notes 19 Ann. Cas. 1179 and Ann. Cas. 1914 D 115.

28—Price v. St. Louis R. Co., 75 Ark. 479, 112 Am. St. Rep. 79; Black v. N. Y., N. H. & H. R. Co., 193 Mass. 448, 9 Ann. Cas. 485 and note, 7 L. R. A. (N. S) 148; Fox v. Mich. Cent. R. Co., 138 Mich. 433, 5 Ann. Cas. 68 and note, 68 L. R. A. 336.

29—Alderson v. Kahle, 73 W. Va. 690, Ann. Cas 1916 E 561 and note.

PART III

ALIENS

CHAPTER V

CITIZENS AND ALIENS

§ 29. Citizenship. The term citizen, by derivation and in its primary use, meant one of the free inhabitants of a city; but in modern usage it commonly means a member of the body politic in a democratic nation, who owes allegiance to the nation and is entitled to protection from it.

It was said in a case famous in American history:[1] "The words 'people of the United States' and 'citizens' are synonymous terms and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call 'the sovereign people,' and every citizen is one of this people and a constituent member of this sovereignty."

The term citizen was originally confined to the member of a democratic state, "subject" being the equivalent term used in referring to those under the government of a monarchy; but the distinction is not always strictly preserved.[2]

1—**Dred Scott v. Sandford, 19 How. (U. S.) 393,** per Taney, C. J. "Citizens are the members of the political community to which they belong." United States v. Cruikshank, 92 U. S. 542.

See also Minor v. Happersett, 21 Wall. (U. S.) 162, and Greenough v. Tiverton Police Commrs., 30 R. I. 212, 136 Am. St. Rep. 953, and see the conflicting decisions as to what constitutes citizenship in one of the states, cited in notes 12 and 13.

2—Blackstone (Bk. I, ch. 10) never uses the term "citizen" but always "subject" or "native"; but in recent decisions the English courts, while usually speaking of a British or German subject, occasionally use the terms "citizen" or "citizenship," and do so in reference to German as well as to British subjects. See Rex v. Supt. of Vine Street Police Station,

In modern diplomatic practice the term "nationals" has come to be used in referring generally to the citizens or subjects of a particular nation.[3]

When the Constitution of the United States was adopted, citizenship of the state was more regarded than that of the United States. Article IV, Sec. 2, provided that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States"; and Article III, Sec. 2, gave jurisdiction to the federal courts of controversies between citizens of different States, between the citizens of a State and foreign citizens or subjects, and so on. Evidently United States citizenship was thought of as based on state citizenship.[4] Citizenship of the United States is not referred to except as a qualification for high federal office,[5] and by implication in the grant to the Congress of the power "to establish a uniform Rule of Naturalization."[6]

But in the stress of the political contest for and against slavery, the majority of the United States Supreme Court held in the famous Dred Scott case[7] that the rights secured to the citizens of each state in the other states could not extend to a free negro, even if he were a citizen of the state in which he lived, since it was held that such citizenship

(1916) 1 K. B. 268, 7 Brit. Rul. Cas. 868; Ex parte Weber (1916) 1 A. C. 421, 7 Brit. Rul. Cas. 880.

"The term 'citizen' as understood in our law is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people; and he who before was 'a subject of the King' is now a citizen of the state. State v. Manuel, 4 Dev. and B. L. (N. C.) 20.

3—For instance, see articles 84, 85, 90, 91, 229, of the Treaty of Peace with Germany as drafted by the Peace Conference of 1919.

4—"It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States. Whether this proposition was sound or not had never been judicially decided." Miller, J., in the Slaughter House Cases, 16 Wall. (U. S.) 36.

5—Article I, secs. 2 and 3; Article II, sec. 1.

6—Article I, sec. 8.

7—Dred Scott v. Sandford, 19 How. (U. S.) 393.

could not have been in the contemplation of the framers of the Constitution. When the principles underlying that decision had been reversed by the result of the Civil War, and slavery had been abolished by the Thirteenth Amendment to the federal Constitution, the Fourteenth Amendment completed the subordination of state to federal citizenship by the broad declaration that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States";[8] and the Fifteenth Amendment especially prohibited the denial of the right to vote to citizens of the United States "on account of race, color, or previous condition of servitude."[9]

By these constitutional changes, state citizenship became dependent upon federal citizenship instead of the reverse.[10]

One may be a citizen of the United States without being a citizen of any state; for instance, a resident of the District of Columbia, of a territory, or of a foreign country.[11]

It has sometimes been held that one may be a citizen of a particular State, and yet not a citizen of the United States.[12] These decisions refer to the situation which has

8—The last clause refers only to action by the states. The Enforcement Act, which provides for removal of a suit into the United States courts when the rights of a party are denied in the state courts, protects a negro from trial by a jury to which only white men are eligible by the state law, Strauder v. West Virginia, 100 U. S. 303; but does not entitle him to remove his case to the United States courts because the administrative officers have failed to summon any negroes upon that particular jury, discrimination by reason of race being prohibited by the state law. Virginia v. Rives, 100 U. S. 313.

9—As to the effect of this amendment, see United States v. Reese, 92 U. S. 214.

10—Boyd v. Nebraska, 143 U. S. 135.

11—Hepburn v. Elizey, 2 Cranch (U. S.) 445; The Slaughter House Cases, 16 Wall. (U. S.) 36.

12—Dred Scott v. Sandford, 19 How. (U. S.) 393; Harding v. Standard Oil Company, 182 Fed. 421; McDonel v. State, 90 Ind.

existed in some States where aliens who had declared their intention to become citizens of the United States, were permitted to vote and hold office. In other decisions it is denied that the conferring of these political rights constitutes the declarant alien a citizen either of the State or of the United States.[13] The real difference in these decisions is in the meaning of the term "citizen of a State." It would seem that one who is a voter, and who may be elected to any office in the State, is a citizen to the extent that a State can confer citizenship, and is fully within the general definitions of citizenship given at the beginning of this section; and consequently may be fairly called a citizen of the State, though his citizenship of the United States has not yet been completed.[14]

Citizenship implies the duty of allegiance to the government, and the right of protection from it; it does not involve the right of suffrage (except to the extent defined in the Fifteenth Amendment) or other political rights. Indeed at all times the great majority of the citizens of the United States have been women, minors, and others not entitled to vote.[15]

A citizen of the United States, resident in one of the states, owes a double allegiance, and can demand from each government protection within the field of its jurisdiction. For the ordinary rights of person and property he looks to the state for protection. The rights for which he can seek the protection of the United States are only such as are

320; State ex rel. Leche v. Fowler, 41 La. Ann. 380; In re Wehlitz, 16 Wis. 443, 84 Am. Dec. 700.

13—Lanz v. Randall, 4 Dillon (U. S.) 425; Minneapolis v. Reum, 56 Fed. 576, 12 U. S. App. 446.

14—"The word citizen and elector are used synonymously." State ex rel. Leche v. Fowler, 41 La. Ann. 380.

15—**Minor v. Happersett, 21 Wall. (U. S.) 162;** Van Valkenburgh v. Brown, 43 Cal. 43, 13 Am. Rep. 136; Dorsey v. Brigham, 177 Ill. 250, 69 Am. St. Rep. 228, 42 L. R. A. 809; Re Robinson, 131 Mass. 376, 41 Am. Rep. 239.

established by the constitution and laws of the United States.[16]

For certain purposes even a corporation may be included within the term "citizen." For instance, a corporation may claim the right to sue in the federal courts as a citizen of the state by which it is incorporated,[17] and a corporation has been held entitled to receive a license to sell liquor under a statute which mentions only "citizens resident within this state;"[18] but a corporation is not within the clause giving to citizens of a State the privileges and immunities of citizens in other States,[19] nor within the Fourteenth Amendment which prohibits any State from abridging the privileges or immunities of citizens of the United States.[20]

§ 30. Citizenship by birth or marriage. The provision of the Fourteenth Amendment to the federal Constitution in regard to the acquisition of citizenship by birth was quoted in the previous section. By this section all persons born

16—**The Slaughter House Cases, 16 Wall. (U. S.) 36;** United States v. Cruikshank, 92 U. S. 542; Twining v. New Jersey, 211 U. S. 78. Twining v. New Jersey gives a list of specific rights which have been held to be of national character and within the protection of the United States, and holds that the privilege of a witness against self-incrimination is not among them.

17—Chicago and N. W. R. Co. v. Whitton, 13 Wall. (U. S.) 270.

It is a more exact statement of the rule to say that a suit by or against a corporation is regarded as a suit by or against its stockholders; but the stockholders are conclusively presumed, for the purposes of federal jurisdiction, to be citizens of the State which by its laws created the corporation; Paul v. Virginia, 8 Wall. (U. S.) 168; Muller v. Dows, 94 U. S. 444; but for all practical purposes the statement of the text is accurate.

18—Greenough v. Tiverton Police Commissioners, 30 R. I. 212, 136 Am. St. Rep. 953.

19—**Paul v. Virginia, 8 Wall. (U. S.) 168;** Pembine Silver Mining Company v. Pennsylvania, 125 U. S. 181; Horn Silver Mining Company v. New York, 143 U. S. 305.

20—Orient Insurance Company v. Daggs, 172 U. S. 557; Hawley v. Hurd, 72 Vt. 122, 82 Am. St. Rep. 922, 52 L. R. A. 195.

in the United States "and subject to the jurisdiction thereof" are by that sole fact citizens of the United States. But this merely affirms what had already been recognized as the law of the land, with the single exception as to colored persons established by the decision in the Dred Scott case.[21] From Lord Coke's day in England, and from the earliest decisions in the United States, it has been the common law that every person born within the territory of a particular nation became *ipso facto* a subject or citizen of that country.[22]

This clause of the Fourteenth Amendment therefore merely removed the limitation and doubt which had been cast upon the rule by the Dred Scott decision. A later effort to procure a similar exception by judicial decision as to a child born in the United States of Chinese parents, who by our legislation are themselves ineligible for naturalization, met with failure and led to a reinstatement of the rule in its original simplicity and inclusiveness.[23]

Section 1992 of the Revised Statutes of the United States repeats in substance the language of the Fourteenth Amendment, saying: "All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States;" but section 1993 grants American citizenship to children born abroad to American parents. "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be

21—Dred Scott v. Sandford, 19 How. (U. S.) 393, discussed in the previous section.

22—The discussion of this principle, and the review of the authorities, made by Mr. Justice Gray in United States v. Wong Kim Ark, 169 U. S. 649, 655-665, is so full and satisfactory that further citation of authorities is practically superfluous. But reference may also be made to the early leading case of Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 583, 658.

23—United States v. Wong Kim Ark, 169 U. S. 649.

citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

By this statute the United States seems to claim rights in children born in other countries of an American father inconsistent with its claims as to children born here of foreign parents.[24] This inconsistency is lessened by the last clause of section 1993, which limits the inheritance of citizenship to the first foreign-born generation, and by a later statute[25] which requires such foreign-born citizens, if they continue to live abroad, to register their intention to return to and be citizens of the United States at the age of eighteen, and to take oath of allegiance to the United States at the age of twenty-one, in order to claim the protection of the United States. In practice, also, our government has refused to claim allegiance or extend protection under this statute as against the claim of the country in which the person was born, and in which he continues to reside.[26] Great Britain has a similar statute, and also declines to assert it against the country in which children of her subjects are born and continue to reside.[27]

The phrase "and subject to the jurisdiction thereof" in the Fourteenth Amendment excludes from citizenship by birth those who, while born within the geographical limits of the United States, were so circumstanced as not to be born within its allegiance. The clearest instance of a case within this exception is that of children born to ambassadors

24—See, as to the application of this act, State ex rel. Phelps v. Jackson, 79 Vt. 504, 8 L. R. A. (N. S.) 1245.

25—Act of March 2, 1907, 34 Stat. at L. 1229, U. S. Comp. Stat. of 1918, sec. 3963. This statute establishes clearly the right of election which had already been deduced by necessity from the conflicting rules of citizenship by birth and citizenship by inheritance of the father's status. Ludlam v. Ludlam, 26 N. Y. 356, 371-2, 84 Am. Dec. 193; State ex rel. Phelps v. Jackson, 79 Vt. 504, 8 L. R. A. (N. S.) 1245.

26—See United States v. Wong Kim Ark, 169 U. S. 649, 689-692.

27—*Idem*, pp. 671-2.

or other diplomatic representatives in this country of other nations.[28] Children of an invading enemy born in a country during its temporary hostile occupation in time of war are also born without the allegiance, though within the territory.[29]

In 1855 Congress passed an act conferring citizenship on alien women who should marry American citizens.[30] The status of an American woman who married an alien was somewhat uncertain, especially if she and her husband resided in the United States. In 1907 the Congress passed a comprehensive law, based on the report of a distinguished commission which had been appointed to study the entire subject, by which such a woman was declared to take the nationality of her husband, thus applying the same rule to both cases.[31] In both these cases, provision is made for

28—Mr. Justice Miller said in the Slaughter House Case, 16 Wall. (U. S.) 36: "The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls *and citizens or subjects of foreign states* born within the United States." The italicized words clearly extend the scope of this exception too far.

29—Inglis v. Sailors' Snug Harbor, 7 Pet. (U. S.) 99, 156. This decision applied to the common law rule of citizenship and not directly to the Fourteenth Amendment, which had not yet been passed.

30—"Any woman who has now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." Rev. Stat., sec. 1994; Comp. Stat. of 1918, sec. 3948.

The clause "who might herself be lawfully naturalized" refers simply to her being of a race eligible to citizenship, and does not require that she should have the qualifications of residence and character necessary in an applicant for naturalization. Kelley v. Owen, 7 Wall. (U. S.) 496; Leonard v. Grant, 5 Fed. 11. But this clause prevents a Chinese woman from acquiring citizenship by her marriage to an American citizen. Low Wah Suey v. Backus, 225 U. S. 460.

31—"Any American woman who marries a foreigner shall take the nationality of her husband." Act of March 2, 1907, 34 Stat. at L. 1228, Comp. Stat. of 1918, sec. 3960.

The old rule to the contrary had been clearly stated in Shanks v. Dupont, 3 Pet. (U. S.) 242. "Marriage with an alien, whether a friend or an enemy, produces no dissolution of the native alle-

her to elect between her original and her marital citizenship, when the marital relation is terminated.[32]

Since minor children follow the status of their parent, the marriage of an alien widow to an American citizen makes her children also citizens.[33]

§ 31. Citizenship by naturalization. The Constitution of the United States gives to the Congress the power "to establish a uniform Rule of Naturalization."[34] This power is not expressly declared to be exclusive; but it is evident that uniformity could only be obtained by making the power exclusive in a single government, and it was early decided that the power of Congress is exclusive, and that no state can confer or regulate citizenship of the United States.[35]

The Congress passed a brief act for the naturalization of aliens as early as 1790,[36] and in 1802 a more elaborate act was passed, fixing five years as the period of residence for naturalization, and requiring a declaration of intention two years before the application for naturalization;[37] this was altered in minor details from time to time until 1906, when a comprehensive act was passed which is still in force.[38]

The full effectiveness of the American statutes of nat-

giance of the wife. It may change her civil rights, but it does not affect her political rights or privileges."

32—34 Stat. at L. 1228-1229, Comp. Stat. of 1918, sec. 3960-3961.

See the full discussion of this entire topic in **Mackenzie v. Hare, 165 Cal. 776, Ann. Cas. 1915 B 261 and note, L. R. A. 1916 D 127 and note**; affirmed 239 U. S. 299.

33—Kreit v. Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349.

34—Article I, sec. 8.

35—**Hampden Co. v. Morris, 207 Mass. 167, Ann. Cas. 1912 A 815 and note**; State ex rel. Rushworth v. Judges of Hudson County, 58 N. J. L. 97, 30 L. R. A. 761; Minneapolis v. Reum, 56 Fed. 576; In re Wehlitz, 16 Wis. 443, 84 Am. Dec. 700.

36—Act of March 26, 1790, 1 Stat. at L. 130.

37—Act of April 14, 1802, 2 Stat. at L. 153.

38—Act of June 29, 1906, 34 Stat. at L. 596, Comp. Stat. of 1918, secs. 4351-4384.

uralization was long interfered with by the adherence of most of the European countries to the doctrine of perpetual allegiance, by which it was held that the bond of allegiance between a subject and his sovereign could not be severed without the consent of the sovereign. Consequently the right of expatriation, that is, of voluntarily changing one's nationality, was denied. This was one of the elements of controversy between the United States and Great Britain which led to the War of 1812, and it was also a cause of constant friction with the German Empire and with other powers. Even our own courts and Secretaries of State were not entirely unanimous in their position, until in 1868 the Congress passed an act declaring the right of expatriation to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness," and that "all naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens."[39] Since that time the right of expatriation has been firmly asserted by the United States, and has been admitted by Great Britain, Germany and most of the other powers. Of course the United States also recognizes the right of American citizens to remove to other countries and

39—Act of July 27, 1868, Rev. Stat., secs. 1999, 2000, Comp. Stat. of 1918, 3955-6.

For the diplomatic history of this controversy see III Moore's International Law Digest, 552-735; and for the early decisions of our courts see Mackenzie v. Hare, 165 Cal. 776, Ann. Cas. 1915 B 261, L. R. A. 1916 D 127; and the same case, 239 U. S. 299.

Chancellor Kent, after reviewing the decisions to his time (1826), concluded that "the better opinion would seem to be that a citizen cannot renounce his allegiance to the United States without the permission of government to be declared by law, and that as there is no existing regulation in the case, the rule of the English Common Law remains unaltered." II Kent's Com. 49.

And the doctrine of perpetual allegiance was emphatically affirmed by the Supreme Court of the United States in 1830. Shanks v. Dupont, 3 Pet. (U. S.) 242.

become citizens or subjects thereof in accordance with their laws.[40]

The act of 1802 conveyed the right of naturalization to "free white persons;" after the adoption of the Thirteenth and Fourteenth Amendments, this was extended to include "aliens of African nativity and persons of African descent."[41] But persons who are neither of the white nor of the African race are still excluded from naturalization. This rather difficult distinction has been interpreted by the courts so as to include within the white race people of all the European races, and the Caucasian people about the Mediterranean Sea, to include Assyrians, Armenians, Parsees and Turks, and to exclude Mongolians and Malays.[42]

It is hardly necessary to set forth at length the details of the present naturalization statute. The applicant must have continuously resided in the United States for five years before his application, and he must have appeared in court at least two years before, and then declared his intention to become a citizen of the United States and to renounce allegiance to his former sovereign. He must prove by the oath of at least two persons his residence, and also that "during that time he has behaved as a man of good moral

40—Act of March 2, 1907, 34 Stat. at L. 1228, Comp. Stat. of 1918, sec. 3959.

41—Rev. Stat., sec. 2169, Comp. Stat. of 1918, sec. 4358.

42—See a full account of the decisions in 2 Corpus Juris., 1113-4.

"We think that the words refer to race, and include all persons of the white race as distinguished from the black, red, yellow or brown races, which differ in so many respects from it. Whether there is any pure white race, and what persons belong to it, may involve nice discriminations, but for practical purposes there is no difficulty in saying that the Chinese, Japanese and Malays, and the American Indians, do not belong to the white race." **United States v. Balsara, 180 Fed. 694.**

The native Hawaiian is not of the white race. In re Kanaka Nian, 6 Utah 259, 4 L. R. A. 726; nor a Japanese; in re Yamashita, 30 Wash. 234, 94 Am. St. Rep. 860, 59 L. R. A. 671.

Chinese are excluded by a particular statute. Act of May 6, 1882, 22 Stat. at L. 61, Comp. Stat. of 1918, sec. 4359.

character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same."[43] When his evidence is found satisfactory, he must take an oath to support and defend the Constitution and laws of the United States against all enemies, and bear true faith and allegiance to the same, and must absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatsoever, and particularly by name to the sovereign or state of his former allegiance. He must also renounce any title or order of nobility which he has borne. Special proof is required that he is not an anarchist or polygamist, and he must be able to speak English. Alien enemies cannot be admitted to citizenship except under certain exceptional circumstances; on the other hand Filipinos, Porto Ricans, and aliens who have served honorably in the army, navy, marine corps or merchant marine, are relieved from many of the requirements of the statute.[38]

Jurisdiction to naturalize aliens is vested in the courts of the United States, and in certain State courts of high rank. It was at one time doubted whether the power to naturalize aliens could lawfully be conferred upon or exercised by State courts. But the question has long been settled in favor of the power of Congress to confer that jurisdiction upon State courts. When exercising it, they are for the time being courts of the United States, and can act only in strict compliance with federal law. It is, however, not imcumbent upon the States to provide tribunals to administer the federal laws; and consequently a State may prohibit or limit the exercise of the power by its State courts.[44]

43—As to the requirement of good character, see United States v. Hrasky, 240 Ill. 560, 130 Am. St. Rep. 288, 16 Ann. Cas. 279 and note.

44—State ex rel. Rushworth v. Judges of Hudson Co., 58 N. J. L. 97, 30 L. R. A. 743; Holmgram v. United States, 217 U. S. 509, 19 Ann. Cas. 778; In re Gilroy, 88 Me. 199, 51 Am. St. Rep. 392; Hampden County v. Morris, 207 Mass. 167, Ann. Cas. 1912 A 815 and note.

Provision is also made in the statute for proceedings by the government to cancel a certificate of citizenship on the ground that it was procured by fraud. Permanent departure from the United States within five years after naturalization is made by the naturalization act *prima facie* evidence of such fraud; and it was held during the World War in several cases that the fact that a former German subject had shown himself loyal to Germany and disloyal to the United States during the war was sufficient evidence that his oath of allegiance to the United States, and his renunciation of allegiance to Germany, was false and fraudulent.[45]

The naturalization of a person confers citizenship upon his minor children "if dwelling in the United States;"[46] and also upon his wife, unless she is of a race incapable of American citizenship.[47]

Congress has power not only to pass general statutes under which individuals may become naturalized, but to directly confer citizenship on collective bodies of aliens. This has often been done in adding new territory to the national domain, the inhabitants of which have been made citizens, and also in admitting to citizenship tribes or particular communities of Indians.[48]

45—**Johannessen v. United States, 225 U. S. 227;** Luria v. United States, 231 U. S. 9.

46—Rev. Stat., sec. 2172, Comp. Stat. of 1918, sec. 4367.

47—See *ante*, sec. 30, note 30.

48—**Boyd v. Nebraska, 143 U. S. 135;** In re Yamashita, 30 Wash. 234, 94 Am. St. Rep. 860, 59 L. R. A. 671.

CHAPTER VI

RIGHTS AND DISABILITIES OF ALIENS.

§ 32. The general rights of aliens. International law does not define the rights of a citizen of one country to reside, hold property, or exercise other rights in another country, and the question is purely one for the domestic law of the state in which the rights are to be exercised.[1]

At the common law resident alien friends (that is, subjects or citizens of a country with which our own country is at peace) were entitled to purchase, own and sell personal estate, to engage in business, and to make contracts and wills. An alien might also receive a deed of land, but the title so acquired was subject to be forfeited to the king or state by an action for that purpose; until such forfeiture had been declared, however, he might remain in possession of the land. But he could not acquire even a defeasible title by descent or by other operation of law, as by dower or curtesy. He was said to have no inheritable blood, and therefore descent could not be traced through an alien, even to a citizen.[2]

1—Apthorp v. Backus, Kirby (Conn.) 407, 413, 1 Am. Dec. 26; Wunderle v. Wunderle, 144 Ill. 40, 19 L. R. A. 84.

2—Blackstone's Com. I, 372; Kent's Com., lecture 25; Abrams v. State, 45 Wash. 327, 122 Am. St. Rep. 914, 13 Ann. Cas. 527, 9 L. R. A. (N. S.) 186; Fairfax v. Hunter, 7 Cranch (U. S.) 603; Levy v. M'Cartee, 6 Pet. (U. S.) 102; Wunderle v. Wunderle, 144 Ill. 40, 19 L. R. A. 84; Jackson v. Fitzsimmons, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198; Cooke v. Doron, 215 Penn. St. 319, 7 Ann. Cas. 502, 7 L. R. A. (N. S.) 659.

"An alien has never been allowed to take by descent or will except by permissive legislation. Such a statute is not the recognition of a pre-existing right, but a fresh grant of grace. The state may limit its favor by imposing an inheritance tax at a higher rate than is imposed on citizens."

But these limited rights were, from the very beginning of the American government, expanded by treaty provisions and by liberal legislation. It was the earnest policy of the United States during its first century to encourage immigration, and by statute in nearly all the states resident aliens were given the right to take the title to land, whether by deed or by inheritance, to hold such real estate and to transmit it by law or by descent. In some states they were even given the right to vote and to hold office.[3] By such treaties and statutes the personal and property rights of resident and friendly aliens became, in most of the states, practically the same as those of citizens. And they were entitled to those fundamental rights of personal liberty, and immunity from oppression, which are guaranteed to all persons by the federal Constitution, notably in Amendments V and VI.[4]

These guaranties of personal and property rights to resident aliens were affirmed and made more specific by the Fourteenth Amendment, which declared not only that no State should abridge the privileges or immunities of citizens of the United States, but that no State shall 'deprive *any person* of life, liberty or property, without due process of law, nor deny to *any person within its jurisdiction* the equal protection of the laws." This extends to all residents of the United States, alien or citizen, the fundamental rights of persons, property and liberty.[5]

The liberty, of which the deprivation without due process of law is forbidden, "means not only the right of the citizen to be free from the mere physical restraint of his

Moody v. Hazen, 36 N. D. 471, Ann. Cas. 1918 A 933.

3—See *ante*, sec. 29, notes 12 and 13.

4—Wong Wing v. United States, 163 U. S. 228.

5—"These provisions are universal in their application to all persons within the territorial jurisdiction without regard to any differences of race, or color or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U. S. 356.

person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned; * * * although it may be conceded that this right to contract in relation to persons or property, or to do business within the jurisdiction of the state, may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes."[6]

6—The quotation in the text is from Williams v. Fears, 179 U. S. 270, 274.

"The 14th Amendment, in declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not

But in applying this broad principle, and distinguishing between regulations which effect an illegal discrimination and those which are within the scope of the police power of the states, the decisions are in some conflict. A San Francisco ordinance which prohibited any person carrying on a laundry business in a wooden building without the consent of the board of supervisors, and in no way defined the terms on which such consent was to be given, and under which it was proved that in fact consent had been refused to all Chinese and granted to many non-Chinese laundries, with no apparent reason for the discrimination except the difference of race, was held unconstitutional.[7] A Pennsylvania statute imposing a tax upon employment of foreign-born aliens was also held void.[8] It has been held in Michigan that a law requiring barbers to be licensed, and making citizenship a condition to the obtaining the license, was void,[9] and in Maine a similar decision was rendered as to a statute regulating peddling;[10] while in other very similar cases it has been held that citizenship, either by birth or by naturalization, creates a sufficient presumption of trustworthiness to justify the discrimination.[11] Membership of the bar stands on a different footing, as it constitutes the person an officer of the court, and *quasi* public official. A requirement that only citizens may be admitted to practice law is therefore valid.[12]

within the Amendment." Barbier v. Connolly, 113 U. S. 27.

7—**Yick Wo v. Hopkins, 118 U. S. 356.**

8—Juniata Limestone Company v. Fagley, 187 Penn. St. 193, 67 Am. St. Rep. 579, 42 L. R. A. 442.

9—Templar v. State Board of Examiners, 131 Mich. 254, 100 Am. St. Rep. 610.

10—**State v. Montgomery, 94 Me. 192, 80 Am. St. Rep. 386.**

11—**Com. v. Hana, 195 Mass. 262, 11 Ann. Cas. 514 and note, 11 L. R. A. (N. S.) 799** (relating to a peddler's license); Trageser v. Gray, 73 Md. 250, 79 Am. St. Rep. 309, 54 L. R. A. 934 (relating to a liquor license).

12—Re Yamashita, 30 Wash. 234, 94 Am. St. Rep. 860, 59 L. R. A. 671. The court in this case assumed the doctrine of the text to be the rule of law without discussion: but the ruling has been approved by dicta in many later decisions.

Aliens owe to the country in which they reside a temporary and limited allegiance; that is, an obligation to obey the laws of the country, and subjection to the jurisdiction of its courts.[13]

Whether aliens resident in the United States are subject to military duty became a question of importance and difficulty in the World War. The Selective Draft Act of 1917[14] declared that "all male citizens or male persons not alien enemies who have declared their intention to become citizens" of the specified age were liable to military service. Section 5 of the Act required all male persons of military age to register, "and all persons so registered shall be and remain subject to draft, unless exempted or excused therefrom as in this Act provided." Under these provisions it was held that non-declarant aliens were entitled to exemption; but that the exemption was not wrought automatically, and that the alien must make claim therefor before the Local Board according to the draft regulations; he could not assert his right to exemption by habeas corpus proceedings, still less by desertion from the military service in which he was placed.[15]

The terms of the Act making a citizen of a neutral country liable to military service if he had declared his intention to become a citizen of the United States conflicted with our treaties with certain countries, and threatened to create international difficulties; and by the amendment of 1918 it was provided "that a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President

13—Carlisle v. United States, 16 Wall. (U. S.) 147.

14—Act of May 18, 1917, chapter 15, sec. 2.

15—Ex parte Hutflis, 245 Fed. 798; United States ex rel. Koopowitz v. Finley, 245 Fed. 871; Ex parte Blazekovic, 248 Fed. 327; United States ex rel. Kubyluck v. Ball, 248 Fed. 995. And see the note, L. R. A. 1918 E 1020-3.

may prescribe, withdrawing his intention to become a citizen of the United States, *which shall operate and be held to cancel his declaration of intention to become an American citizen, and he shall forever be debarred from becoming a citizen of the United States.*"[16]

§ 33. Non-resident aliens. A non-resident alien is not within the terms of the Fourteenth Amendment, and it has been doubted whether he can invoke the provisions of the state and federal constitutions at all.[17] A statute imposing a higher inheritance tax on property passing to a non-resident alien than if he were a resident of the United States is valid.[18] But non-resident aliens are included within the benefits of a statute conferring rights in general terms (such as an act giving to relatives the right to sue for a tort causing death), though they are not specifically mentioned.[19]

16—Act of August 31, 1918, chapter 166, sec. 1.

17—Moody v. Hagen, 36 N. D. 471, 485, Ann. Cas. 1918 A 933, L. R. A. 1918 F 947.

"This inhibition is only for the benefit of persons who are physically present within the territorial jurisdiction of the state the protection of whose laws they invoke." State v. Travelers Insurance Co., 70 Conn. 590, 66 A. S. R. 138.

18—Moody v. Hagen, 36 N. D. 471, Ann. Cas. 1918 A 933, L. R. A. 1918 F 547, affirmed 245 U. S. 633.

This case is directly contrary to Re Stixrud, 58 Wash. 339, Ann. Cas. 1912 A 580, 33 L. R. A. (N. S.) 632, on the question of the effect of the Swedish treaty with the United States; but the conflict seems to be settled by the affirmance of Moody v. Hagen in the Supreme Court of the United States.

19—**Anustakasas v. International Contract Co., 51 Wash. 119, 130 Am. St. Rep. 1089 and note, 21 L. R. A. (N. S.) 267 and note;** Petek v. Am. Smelting and Refining Co., 154 Fed. 190, 83 C. C. A. 284, 21 L. R. A. (N. S.) 273; Taylor v. Albion Lumber Co., 176 Cal. 347, L. R. A. 1918 B 185; Ferrara v. Auric Mining Co., 43 Col. 496, 17 L. R. A. (N. S.) 964; Atchison R. Co. v. Fajardo, 74 Kan. 314, 6 L. R. A. (N. S) 681; Lykiardopoulo v. New Orleans Light and Power Co., 127 La. 309, Ann. Cas. 1912 A 976; Mulhall v. Fallon, 176 Mass. 266, 79 Am. St. Rep. 309, 54 L. R. A. 934; Alfson v. Bush Co., 182 N. Y. 393, 108 Am. St. Rep. 815 and note; Pittsburgh R. Co. v. Naylor, 73 Ohio St. 115, 112 Am. St. Rep. 701, 3 L. R. A. (N. S.) 473 and note.

In many cases the rights of aliens, both resident and non-resident, are controlled by treaty stipulations between the United States and the nations to which they belong; but the interpretation and application of the varying treaty provisions are far too complex a topic to be entered upon here.

Since non-resident aliens have no rights under the Constitution and laws of the United States, they cannot enter this government and acquire the rights incident to residence therein, except as permitted by the government of the United States. It has been said by the Supreme Court: "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and on such conditions as it may see fit to prescribe. In the United States this power is vested in the national government * * * and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."[20] Notwithstanding the declaration by Congress that expatriation is "a natural and inherent right of all people,"[21] it has excluded not only diseased, criminal, pauper and anarchist immigrants, but also assisted contract laborers, and in one instance at least, that of Chinese laborers, has made a rule of exclusion based on race discrimination.[22]

Contra, Deni v. Penn. R. Co., 181 Penn. St. 521, 59 Am. St. Rep. 676; McMillan v. Spider Lake Lumber Co., 115 Wis. 332, 95 Am. St. Rep. 947, 60 L. R. A. 589.

20—Ekiu v. United States, 142 U. S. 651, 659.

And see also Chae Chan Ping v. United States, 130 U. S. 581; Fong Yue Ting v. United States, 149 U. S. 698; Lem Moon Sing v. United States, 158 U. S. 538; Fok Young Yo v. United States, 185 U. S. 296; United States ex rel. Turner v. Williams, 194 U. S. 279.

21—See, *ante*, sec. 31.

22—Chae Chan Ping v. United States, 130 U. S. 581, reviews the original anti-Chinese legislation, and the historical facts which induced it; many of the Chinese cases cited in the preceding notes show the difficulties of interpretation and enforcement that have arisen out of this legislation.

For the general rules of exclu-

To prevent and frustrate fraud in evading the immigration laws, statutes have also been passed for the deportation of Chinese who have entered the country unlawfully,[23] and of other immigrants who entered the country, or are conducting themselves therein, in violation of the conditions of their admission.[24] Such proceedings are not criminal in their act, nor is the necessary detention of the suspect, pending the proceedings, to be considered as a punishment; consequently the right of trial by jury, and the other constitutional regulations of criminal procedure, have no application.[25] But an act adding to the provision for deportation one for imprisonment at hard labor for a period not exceeding one year to be ordered by a Judge or Commissioner, upon a summary hearing and without a jury, is unconstitutional and void.[26]

sion of undesirable aliens, see the acts of February 5, 1917, chapter 29, and of October 16, 1918, chapter 186; and see the note, Ann. Cas. 1917 C 235-248.

23—Act of September 13, 1888, chapter 1015, sec. 13; 25 State at Large 479, Comp. Stat. 4313.

24—Act of February 5, 1917, chapter 29, sec. 18, 19; 39 Stat. at Large 887-9, Comp. Stat. 4289¼j, jj; act of October 16, 1918, chapter 186, sec. 2, Comp. Stat. 4289½b (2).

25—Fong Yue Ting v. United States, 149 U. S. 730.

26—Wong Wing v. United States, 163 U. S. 228.

CHAPTER VII

ENEMY ALIENS.

§ 34. **Enemy aliens.** A modern writer may say, as did Blackstone: "When I mention these rights of an alien, I must be understood of alien friends only, of such whose countries are at peace with ours; for alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war."[27] So it was said in an early American case: "War gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found. The mitigations of this rigid rule which the humane and wise policy of modern times has introduced into practice will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to carry it into operation the judicial department must give effect to this law."[28]

But the confiscation of private property (except marine property or contraband) of enemy aliens, whether resident or non-resident, is condemned by modern public sentiment, if not by international law, and it is not the custom of civilized states to confiscate such property.[29]

27—1 Bl. Com. 372-3.

28—Brown v. United States, 8 Cranch (U. S.) 122-3; DeLacey v. United States, 249 Fed. 625, L. R. A. 1918 E 1011.

29—"In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness may still be said to exist; but it may well be considered as a naked impolitic right, condemned by the enlightened conscience and judgment of modern times." Hanger v. Abbott, 6 Wall (U. S.) 532.

"Laws confiscating the property of the private citizens of an enemy's country are justly odious. These humane and enlightened principles are fully recognized by the courts of this country, and are

§ 35. Resident enemy aliens. The considerations which justify drastic measures against enemy aliens resident in this country differ somewhat from those relating to residents of the hostile country; and this difference causes the term "enemy aliens" to be differently defined in the two cases. As to the first, it is evident that subjects of the hostile power, if resident within our own country, may be more dangerous to our safety than if they were in their country's army. While many such aliens, hostile only in legal theory, may be quiet and submissive to the local laws, the government must have the power to deprive of any opportunity to attack us from within those whom it knows or believes to be dangerous.

In 1798 Congress passed a law declaring that in time of war any citizen or subject of the enemy power, "being males of the age of fourteen years who shall be within the United States, * * * shall be liable to be apprehended, restrained, secured, and removed as alien enemies;" and empowering the president to direct by proclamation the degree of restraint to which they shall be subject, in what cases and upon what security their residence shall be permitted, and to provide for their removal. This act still remains in force with the single exception that the word "males" was deleted in 1918, thus applying the act to women as well

founded upon the common law and the modern law of nations." Blackwell v. Willard, 65 N. C. 555, 6 Am. Rep. 749.

See also Posselt v. D'Espard, 87 N. J. Eq. 571.

In the World War the United States appointed an Alien Property Custodian whose duty it was to take possession of property, collect debts and enforce other rights of alien enemies resident without the United States, and to hold and administer such property and pay such money into the United States Treasury. "After the end of the war any claim of any enemy * * * to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury shall be settled as Congress may direct." Act of October 6, 1917, ch. 106, 40 Stat. at L. 415-423; amended by Act of March 28, 1918, ch. 28, sec. 1; Comp. Stat. 1918, sec. 3115½ cc to 3115½ ff.

as to men.[30] Under this act, during the World War, the President by proclamation required all alien enemies to register, rigidly restricted their freedom of travel and action by prohibition of many acts thought to contain the possibility of danger, and declared that "An alien enemy whom there may be reasonable cause to believe to be aiding or about to aid the enemy," or to be dangerous to the public safety, or to be violating any regulation or law of the United States, "will be subject to summary arrest and confinement in such penitentiary, prison, jail, military camp or other place of detention as may be directed by the President."[31]

Another statute, unaltered since 1798, provides for the removal from the United States of any alien, upon the warrant of the President or the order of any court, judge or justice.[32]

Under these statutes and regulations many hundred alien enemies were summarily arrested, interned, and in some cases deported during the World War. Similar legislation has been held to be valid by the Court of King's Bench, and

30—Act of July 6, 1798, ch. 66, sec. 1, Rev. Stat., sec. 4067; amended by Act of April 16, 1918, ch. 55; Comp. Stat. 1918, sec. 7615.

31—Proclamation of April 6, 1917, given in Comp. Stat. of 1918, sec. 7615, note.

The proclamation also declared: "So long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States; and towards such alien enemies as conduct themselves in accordance with law, all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States."

32—Act of July 6, 1798; Rev. Stat. 4070; Comp. Stat. of 1918, sec. 7618.

33—Rex v. Supt. of Vine Street Police Station, (1916) 1 K. B. 268, 7 Brit. Rul. Cas. 868.

See also Ex p. Graber, 247 Fed. 882.

it was held that the courts would not interfere by *habeas corpus* with the exercise of the power.[33]

§ 36. Residents of the enemy country. As to subjects of the enemy power resident in their own country, they cannot be directly dealt with except by the military power. But the controlling principle regulating relations between hostile governments or peoples is that of non-intercourse. All contracts, correspondence and business with the enemy are unlawful;[34] and this prohibition has become even more

34—The Rapid, 8 Cranch (U. S.) 155; Hanger v. Abbott, 6 Wall. (U. S.) 532; Hall v. Coppell, 7 Wall. (U. S.) 542; United States v. Grossmayer, 9 Wall. (U. S.) 72; Tingley v. Mueller, (1917) 2 Ch. 144, 8 Brit. Rul. Cas. 681 and note, Ann. Cas. 1918 C 726.

"When the head of a state or sovereign declares war against any sovereign * * * these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other." **Griswold v. Waddington, 16 Johns. (N. Y.) 438.**

In Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 42, after a very careful review of the authorities by Gray, J., it was held that the prohibition only applied to "commercial intercourse," and did not include the leasing of a farm in the hostile country. This limitation was affirmed in Sands v. N. Y. Life Ins. Co., 50 N. Y. 626, 10 Am. Rep. 435; but was denied in Robson v. Premier Oil Co., (1915) 2 Ch. 124, 7 Brit. Rul. Cas. 814, Ann. Cas. 1917 C 227.

"At present it may be safely affirmed that there is no recognized exception but permission of a state to its own citizen, which is also implied in any treaty stipulation to that effect entered into by the belligerents." Scholefield v. Eichelberger, 7 Pet. (U. S.) 586.

"The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same state with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war." N. Y. Life Ins. Co. v. Davis, 95 U. S. 425; Williams v. Paine, 169 U. S. 55, 70-1.

It was held in New York that if a policy of life insurance was issued before the war, and the insured became an alien enemy, the payment of premiums is necessarily suspended and no forfeiture for non-payment will occur. Sands v. N. Y. Life Ins. Co., 50 N. Y. 626, 10 Am. Rep. 435. But the United States Supreme Court re-

important in recent wars, when the blockade has become a most important weapon of war, than formerly.

It is evident that our courts could entertain no suit brought by an enemy alien, since that would be to place the machinery of our government at the service of the enemy to increase his resources.[35] If, while a suit is pending, war is declared between the country of the alien plaintiff and that of the defendant, the action cannot be prosecuted during the war, and must be either dismissed or suspended.[36] But the bringing of an action against an

versed this decision, and held that the assured, after the war, had the right to recover the accrued equitable value of his policy. N. Y. Life Ins. Co. v. Statham, 93 U. S. 24; N. Y. Life Ins. Co. v. Davis, 95 U. S. 425.

It was held in Hubbard v. Matthews, 54 N. Y. 43, 13 Am. Rep. 562, that if partners in different states became enemies by the outbreak of war, the partnership is *ipso facto* dissolved, but the parties remain bound for all antecedent engagements and must account to each other after the war; and in Stevenson v. Aktiengesellshaft, (1917) 1 K. B. 842, 7 Brit. Rul. Cas. 600 and note, (1918) 2 A. C. 239, Ann. Cas. 1918 D 575, that an English partner, who had continued to do business with the partnership assets during the war, was bound to account to the enemy partner for his share of the profits.

See the discussion of the status of an ante-war partnership in Griswold v. Waddington, 16 Johns. (N. Y.) 438.

As to the application of the rule of non-intercourse to other classes of contracts, see the notes, Ann. Cas. 1917 C 195-204, Ann. Cas. 1918 C 713-6.

35—**Porter v. Freudenberg, (1915) 1 K. B. 857, 5 Brit. Rul. Cas. 548 and note, Ann. Cas. 1917 C 215;** Hanger v. Abbott, 6 Wall. (U. S.) 532; Rothbarth v. Herzfeld, 179 App. Div. (N. Y.) 865, 167 N. Y. Supp. 199; Taylor v. Albion Lumber Co., 168 Cal. 347, L. R. A. 1918 B 185 and note.

"An alien enemy has no right of action whatever during the war; but by the law of nations, confirmed by universal usage, at the end of the war all the rights and credits which the subjects of either power had against the other are revived; for during the war they are not extinguished but merely suspended." Wilcox v. Henry, 1 Dall. (Pa.) 69.

As to the rights of alien enemies as litigants, see also notes Ann. Cas. 1917 C 204-210, Ann. Cas. 1918 C 716-722, and L. R. A. 1918 B 189.

36—**Hutchinson v. Brock, 11 Mass. 119;** Levine v. Taylor, 12 Mass. 8; Plettenberg v. Kalmon, 241 Fed. 605; Stumpf v. Schreiber, 242 Fed. 80.

enemy alien is not opposed to any rule of public policy, and such an action may be maintained.[37] Of course there would be difficulty in making service on the defendant unless he had property in this country, or some agent capable of receiving service. And it follows as a requirement of elementary justice that the defendant has the right to defend the action and to employ counsel for that purpose.[38]

But in applying the prohibition against intercourse with the enemy, the term "enemy alien" means one who is resident in the hostile country rather than one of enemy nationality. The purpose is to isolate the hostile country and prevent the enhancement of its resources, and in seeking that end the legal nationality of the foreign litigant is comparatively immaterial. A citizen of our own country, if residing or at least if carrying on business in the enemy country, is an enemy within this field of the law.

On the other hand, if the subject of an enemy power, resident in our own country, has been found harmless and permitted to remain here, he must in reason be permitted to do business, to make contracts, and if necessary enforce such contracts by suit.[39] And in a recent English case it

37—Masterson v. Howard, 18 Wall. (U. S.) 99; Porter v. Freudenberg, (1915) 1 K. B. 857, 5 Brit. Rul. Cas. 548, Ann. Cas. 1917 C 215.

38—McVeigh v. United States, 11 Wall. (U. S.) 259; Porter v. Freudenberg, *ut supra;* Kaiser Wilhelm II, 246 Fed. 786, L. R. A. 1918 C 795.

39—Porter v. Freudenberg, *ut supra;* Daimler v. Continental Tyre Co. (1915) 1 K. B. 893, 5 Brit. Rul. Cas. 304, (1919) 2 A. C. 307, 6 Brit. Rul. Cas. 269, Ann. Cas. 1917 C 170 and note; Tingley v. Mueller, (1917) 2 Ch. 144, 8 Brit. Rul. Cas. 681, Ann. Cas. 1918 C 726; Hutchinson v. Brock, 11 Mass. 119; Heiler v. Goodman's Motor Express Co., 92 N. J. L. 415, 3 A. L. R. 336 and note; Arndt-Ober v. Met. Opera Co., 169 N. Y. Supp. 304.

In Posselt v. D'Espard, 87 N. J. Eq. 571, it was held that under the liberal terms of the President's proclamation suits could be maintained for the necessary protection of the rights of an alien enemy, though residing in the hostile country, the court being bound to guard its decree so as to prevent property coming into the possession of the enemy.

has been held that an alien of enemy nationality, but resident in England, could bring suit in the English courts though he had been interned by order of the government.[40]

The nationality of a corporation also, for the purpose of classing it as enemy or friend, will ordinarily be determined by the location of its business;[41] but it has been held recently in the House of Lords that if all the stockholders, officers and directors of a corporation except the secretary, who held a single share of stock only, were enemies residing in the enemy country, so that complete control of the company was in the hands of enemies, it was to be deemed an enemy, though it was incorporated and doing business in England.[42]

40—Schaffenius v. Goldberg, (1916) 1 K. B. 284, 7 Brit. Rul. Cas. 842 and note.

41—The Friendschaft, 4 Wheat. (U. S.) 105; The Cheshire, 3 Wall. (U. S.) 231; Society for Propagation of the Gospel v. Wheeler, 2 Gall. (U. S.) 105, 22 Fed. Cas. 13, 156; note to 5 Brit. Rul. Cas. 333.

The Trading with the Enemy Act in the World War defined an enemy corporation as one "incorporated within the territory of any nation with which the United States is at war, or incorporated within any country other than the United States, and doing business within such territory." Act of October 6. 1917, ch. 106, sec. 1; 40 Stat. at L. 411; Comp. Stat. of 1918, sec. 3115½ aa.

42—Daimler v. Continental Tyre Co. (1916) 2 A. C. 307, 6 Brit. Rul. Cas. 269, Ann. Cas. 1917 C 170 and note.

B

THE LAW OF DOMESTIC RELATIONS

PART IV

HUSBAND AND WIFE

Including

MARRIAGE AND DIVORCE

CHAPTER VIII

MARRIAGE.

§ 37. Of the nature of marriage. At the foundation of the domestic relations, as of all other relations, lies the institution of marriage and the relation of husband and wife; and the subject of the present chapter will be the entrance into that relation, the formation of the marriage contract.

It is stated in many elementary legal treatises that marriage is a civil contract; and this statement is a very common one,[1] and yet it is very partial and very misleading. It would be more accurate to say: marriage is a status; defined by law, entered into by contract.[2] There must indeed be a contract between a man and a woman to form the marriage relation; but when it is formed, nothing could be more unlike the relation of those bound together by mere contract relations than the relation of husband and

1—"Our law considers marriage in no other light than as a civil contract * * * and, taking it in this civil light, treats it as it does all other contracts; allowing it to be good and valid in all cases where the parties at the time of making it were, in the first place, willing to contract, secondly, able to contract, and, lastly, actually did contract in the proper forms and solemnities required by law." I Bl. Comm. 433.

"The common law of England (and the like law exists in America) considers marriage in no other light than as a civil contract. The holiness of it is left entirely to ecclesiastical and religious scrutiny." Story, Conflict of Laws, I, § 108; II Kent's Comm. 87.

2—Indeed, the highest court of England declared in 1844 that at the common law the marriage relation could not be entered into by contract, nor even by a religious ceremonial performed by a dissenting minister; but only "in the presence of an ordained priest" of the Church of England. See Regina v. Millis, 10 Clark and Finnelly 534, more fully discussed *post*, notes 7 and 23.

wife. For instance: (a) parties who form a contract can terminate it at their pleasure; not so of marriage. It can only be dissolved by the law, acting upon considerations of public policy. (b) Parties who form a contract relation can fix its terms to suit themselves; but in marriage the parties only consent to enter into the relation, the law fixes absolutely its terms. (c) In case of removal from one jurisdiction to another, the terms of a contract are construed by the law of the place where the contract was made; the incidents of the marital relation by the law of the domicil where they may at any time reside.[3] (d) Breach of any other contract—even of the agreement to make a future marriage—may be redressed by a suit by the injured party for damages. Breach of the marriage contract is never punished by suit of the injured party to recover damages from the other. In flagrant cases it is punishable by criminal proceedings instituted by the state. (e) The obligation of a contract cannot, by the express terms of the Constitution of the United States, be impaired by any subsequent legislation; but this prohibition does not extend to the so-called contract of marriage.[4]

To sum up: marriage is a status created by a contract between the parties, but defined as to its formation, its dissolution, and the rights and duties resulting from it, by the law of the marital domicile.[5]

3—Mason v. Fuller, 36 Conn. 160; Mason v. Homer, 105 Mass. 116.

4—**Maynard v. Hill, 125 U. S. 190.**

5—Story on Conflict of Laws, I, §§ 109-112; Maynard v. Hill, 125 U. S. 190, citing and reviewing Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; **Cunningham v. Cunningham, 206 N. Y. 341, 43 L. R. A. (N. S.) 355 and note;** Adams v. Palmer, 51 Me. 481; Maguire v. Maguire, 7 Dana (Ky.) 181; Ditson v. Ditson, 4 R. I. 101; Noel v. Ewing, 9 Ind. 37.

"It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. * * *

When a marriage has in fact been celebrated, but it is in some respect in violation of the marriage law, the question often arises whether the marriage (if the defect is sufficient to invalidate it) is void or voidable. A marriage is void when it is not valid for any legal purpose, and its invalidity may be asserted in any proceeding in any court, between any parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly or collaterally. It is voidable if it was forbidden by law, or did not fully comply with the requirements of the law, but its validity can be challenged only during the lifetime of both the parties, in a proceeding instituted for the very purpose of obtaining a judgment declaring it null. And a voidable marriage may often be validated by later acts of ratification. This distinction will often be referred to in the following paragraphs.[6]

§ 38. **Capacity of the parties.** Not only does the law define the rights created by the marriage contract, but it

It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." Maynard v. Hill, *ut supra.*

"It is not, then, a contract within the meaning of the clause of the constitution which prohibits the impairing the obligation of contracts. It is, rather, a social relation like that of parent and child, the obligations of which arise not from the consent of conferring minds, but are the creation of the law itself, a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress." Adams v. Palmer, 51 Me. 483.

See also Allen v. Allen, 73 Conn. 54, 84 Am. St. Rep. 135, 49 L. R. A. 142; and State v. English, 101 S. C. 304, L. R. A. 1915 F 977.

The California Civil Code (Sec. 55) defines marriage as "a personal relation arising out of a civil contract." Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918 E 184, L. R. A. 1918 B 415.

6—See the full discussion of this distinction in the note to L. R. A. 1916 C 690, and its application to different classes of defective marriages in following cases and notes in the same volume.

regulates the making of the contract itself, our American statutes commonly requiring it to be made in the presence of a magistrate, or of some authorized minister of religion, and recorded in the public records, that there may be certainty and reliable evidence as to the fact. But even where the marriage is required to be entered into before a magistrate or minister, the formation of the marriage relation, the making of the marriage contract, rests primarily not upon the words uttered by the officiating magistrate or minister, but upon the mutually expressed agreement of the parties.[7]

As in the case of every contract, there must be in the first place parties able to contract; that is, in this case, able to form the marriage contract.[8]

First, they must be of the age fixed by law. Here again, marriage contracts are treated very differently from other

7—Even in the famous decision of the House of Lords in 1844 (Regina v. Millis, 10 Cl. and Fin. 534), which held that a marriage celebrated with due religious ceremonial by a Presbyterian minister in Ireland, and followed by marital cohabitation, would not render a later marriage entered into by the husband, while the former wife was still living and undivorced, bigamous, the decision does not make it clear just what part of a church marriage constitutes a complete and perfect marital status; in some parts of the opinion a contract "in the presence of" an ordained priest of the Church of England is spoken of, in others "a marriage duly solemnized according to the rites of the church."

According to the American view as to the essence of a common law marriage, if a couple should go through the form of a church wedding so far as to each pronounce the usual vows and take the other as husband and wife, and the officiating minister should then be stricken down by illness before "pronouncing them man and wife," a valid and complete marriage would undoubtedly have been formed. See the Millis case more fully discussed hereafter, note 23.

8—As to the marriage of slaves, see Butler v. Butler, 161 Ill. 451, Middleton v. Middleton, 221 Ill. 623, and Merrick v. Betts, 214 Mass. 223; as to Indian marriages see Johnson v. Johnson, 30 Mo. 72, 77 Am. Dec. 598; Buck v. Branson, 34 Okla. 807, 50 L. R. A. (N. S.) 876; and the note, Ann. Cas. 1918 E 380.

contracts; while other contracts may be made by persons of twenty-one years of age or over, the marriage contract,—the most important of all, and the one in which imposition is at least as likely to be practised, and youth and inexperience as likely to lead one to act unwisely as in any other,—may be entered into by boys and girls of much younger age. This is doubtless not because young persons are more competent to make this contract wisely than any other, but because of the immorality likely to result, and the scandals likely to follow, from attempting to prohibit earlier marriages.

The age at which by the English common law a boy and girl might be married was fourteen for the boy, twelve for the girl.[9] This age is manifestly earlier than is suited

9—Pollock and Maitland, in their great history of English Law (Vol. 2, p. 388-9), point out that in early England child marriages were not infrequent, even of children under seven years; but that such marriages were deemed to be voidable when the child husband or wife arrived at marriageable age. The common law afterward became settled that marriages of infants under seven were absolutely void; but that if they were above seven and under fourteen or under twelve respectively, the marriage was not void, but might be avoided by either party when the infant arrived at marriageable age; and that if he or she did not then disaffirm it, but began or continued marital relations with the other spouse, the marriage was thereby ratified and became binding. 1 Bl. Comm. 436, and Chitty's Notes 11 and 12 thereto.

"If the wife be past the age of 9 yeares at the time of the death of her husband, she shall be endowed, of what age soever her husband be, howbeit he were but 4 yeares old." Coke on Littleton, 33 A.

"The time of agreement or disagreement, when they marrie *infra annos nubiles*, is for the woman at twelve or after, and for the man at fourteen or after, and there need no new marriage, if they so agree; but disagree they cannot before the said ages, and then they may disagree and marrie againe to others without any divorce; and if they will after give consent, they can never disagree. If a man of the age of fourteen marrie a woman of the age of ten, at her age of twelve he may as well disagree as she may, though he were of the age of consent; because in contracts of matrimony either both must be bound, or equal election of disagreement given to both." Coke on Littleton, 79 B.

to the social and physical conditions of our modern times, and nearly all of our states have fixed a later age at which the marriage contract may be entered into.[10]

2 Kent's Comm. 78-79; Sokel v. State, 212 Ill. 238; Koonce v. Wallace, 7 Jones L. (N. C.) 194; Parton v. Hervey, 1 Gray (Mass.) 119; Goodwin v. Thompson, 2 Greene (Iowa) 329.

Shafher v. State, 20 Ohio 1, holds that a marriage in which one party is under age is void, and does not create the marital status until it has been ratified after maturity; so that a remarriage without any annulment of the premature marriage would not be bigamy. But the current of authority is that the prohibited marriage is voidable only, as stated by Blackstone and Coke, *supra*. Beggs v. State, 55 Ala. 108; Walls v. State, 32 Ark. 565; People v. Slack, 15 Mich. 193; Hunt v. Hunt, 23 Okla. 490, 22 L. R. A. (N. S.) 1202 and note; Fisher v. Bernard, 65 Vt. 663; State v. Cone, 86 Wis. 498.

In State v. Lowell, 18 Minn. 166, 79 Am. St. Rep. 358, 46 L. R. A. 440, the court assume that a marriage would be void if either party were below the common law age; but hold that if they were both competent at common law, but was below the statutory age, the marriage was only voidable by a decree obtained by the incompetent party.

10—In South Carolina the common law age limit seems to be left in force by the absence of any statute. Kentucky, Louisiana, Tennessee and the Philippine Islands have adopted the common law rule by statute. The following list gives the age of ability to marry in each state, the first figure in each case being that of the boy, the second that of the girl; 14-13, New Hampshire; 15-15, Missouri; 16-14, Iowa, North Carolina, Texas, Utah; 17-14, Alabama, Arkansas, Georgia; 18-15, California, Hawaii, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Wisconsin; 18-16, Arizona, Illinois, Indiana, Michigan, Montana, Nebraska, Nevada, Ohio, Porto Rico, West Virginia, Wyoming. In Kansas couples under seventeen and fifteen may not marry without the consent of the probate judge; in other states the marriage of immature persons requires the consent of parent or guardian. Without such consent, the marriage of persons below 18 and 16 is prohibited in Delaware; below 18 and 18 in Idaho and Tennessee; below 21 and 16 in Maryland; below 21 and 18 in California, Colorado, District of Columbia, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oregon, Ohio, South Dakota, Vermont, Washington, Wyoming; below 21 and 21 in Connecticut, Florida, Pennsylvania, Porto Rico, Rhode Island, West Virginia. In Michigan a girl under 18 must have her parents' consent. In Massachusetts it is

Second, they must have sufficient mental capacity. This is a more difficult rule to apply than others which we shall discuss, because the determining fact is not one definitely ascertainable—like age, relationship, or former marriage—but is one in which the question may be often doubtful and not ascertained until it has been tried and decided by a competent court. Mental incapacity shades all the way from raving mania or absolute idiocy to mere feebleness of intellect. The rule is that each of the parties must have been mentally capable of understanding the contract of marriage, and of entering into it knowing what he or she was doing.[11]

expressly provided that, even with the parents' consent, persons below fourteen and twelve may not be married; and doubtless the common law prohibition exists in the other states in the absence of statutes.

11—"He should have had at the time sufficient mental capacity to enable him to understand the nature of the marriage relation, the nature of the marriage contract, and to understand that upon himself he took with it all the duties, obligations and responsibilities, which the law would impose upon him as a result of that contract on his part." St. George v. Biddeford, 76 Me. 593; Jackson v. Jackson (1908) P. 308, 3 Brit. Rul. Cas. 452 and note; Smith v. Smith, 47 Miss. 211; Kern v. Kern, 51 N. J. Eq. 574; Svanda v. Svanda, 93 Neb. 404, 47 L. R. A. (N. S.) 667.

"The question is not whether she was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject." Hunter v. Edney, L. R. 10 Pr. D. 93. The morbid delusions in this case were such as to make a serious case of insanity and unfitness for the marriage relation.

In Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275, and Kern v. Kern, *supra*, insane delusions of a less serious nature were held not to be cause for annulment of the marriage. In Lewis v. Lewis, 44 Minn. 124, 20 Am. St. Rep. 559, 9 L. R. A. 505, the existence of kleptomania was held insufficient.

Where a woman eighty-three years of age had been induced by alleged communications from spirits to believe that the man whom she married, and who was in every way unfit for her, was the "Son of Wisdom," having powers like those of Jesus Christ, and destined to be the Saviour of the human race, and that her deceased husband desired her to marry him, and she married him solely to place her fortune at his disposal for the accomplishment of his mission, without any thought of assuming ordinary

It has been said in some cases—perhaps in most of the cases where the question has arisen—that marriage with a person mentally incompetent is void; a nullity that is, of no legal effect, without the sentence of a court dissolving it. But it certainly would not be safe for any party to treat a marriage as void, until it had been annulled by a competent court. Nor would a court be likely to hold such a marriage void, except on a direct suit for that purpose, unless the case was an extreme one.[12]

The question of mental capacity is as to the time of the marriage; subsequent insanity or idiocy has no effect upon the marriage relation.

Mental incapacity to form the marriage relation might be caused by intoxication, if it went so far as to cause complete inability to comprehend the contract entered into;[13] but cases of this kind would be far more likely to fall under the head of fraud, hereafter spoken of.

Third, they must have sufficient physical capacity. The law recognizes the physical facts involved in the marriage

marital relations with him, both the marriage and the will made in his favor were set aside after her death. Orchardson v. Cofield, 171 Ill. 14, 63 Am. St. Rep. 211.

12—The question whether the marriage of an insane person is void or merely voidable is fully discussed in **Re Gregorson's Estate, 160 Cal. 21, Ann. Cas. 1912 D 1124 and note, L. R. A. 1916 C 697 and note.** The prevailing rule seems to be that it is void in the absence of some controlling statute, if one of the parties was really insane or imbecile.

See also Sims v. Sims, 121 N. C. 297, 61 Am. St. Rep. 665, 40 L. R. A. 737.

13—**Dunphy v. Dunphy, 161 Cal. 380, Ann. Cas. 1913 B 1230 and note, 38 L. R. A. (N. S.) 818 and note;** Prine v. Prine, 36 Fla. 676, 34 L. R. A. 87 and note; Gillett v. Gillett, 76 Mich. 184.

In Barber v. People, 203 Ill. 543, a man was prosecuted for bigamy and claimed in defense that the first marriage was void by reason of his intoxication. The Court said that the fact of intoxication would render the marriage voidable but not void; and that "the law will not permit a party to a marriage contract to stultify himself by proving, upon a trial for bigamy, that he was voluntarily intoxicated at the time of the first marriage, as a means of inculpating himself by rendering void what would otherwise be a valid marriage."

relation, so far as to make incurable impotency an incapacity to form the marriage contract; but it must extend to complete inability to have sexual intercourse, not mere barrenness, the inability to bear or procreate children.[14]

In recent years there has been a demand for legislation to prevent marriages of those who are physically unfit, and in a few of the states so-called "Eugenic Laws" have been passed, requiring physical examination of one or both of the parties as a prerequisite to obtaining a marriage license.[15] That one of a betrothed couple is so diseased that marital life would seriously endanger his health or that of the other party, or of children of the marriage, has been held a justification for breach of the contract to marry.[16]

Fourth, the parties must not be disqualified by reason of relationship. Relationships are of two kinds: those by consanguinity, that is, by relationship by blood or descent from a common ancestor, and those by affinity, that is, by marriage, one of the parties having formerly been married to a relative by blood of the other. In England marriages were formerly under the sole control of the ecclesiastical authorities and regulated by the canon law. This, following the example of the Jewish law stated in the Old Testament, prohibited to the same extent marriages between those related by consanguinity and those related by affinity. The English law carried the prohibition of

14—Bunger v. Bunger, 85 Kan. 564, Ann. Cas. 1913 A 126 and note; Devanbagh v. Devenbagh, 5 Paige Ch. (N. Y.) 554, 28 Am. Dec. 443 and note.

A marriage between persons physically incompetent is voidable only, and not void; and a decree of nullity does not make the marriage void *ab initio*. Bennett v. Bennett, 169 Ala. 618, L. R. A. 1916 C 693 and note.

15—As to the validity of such a statute see Peterson v. Widule, 167 Wis. 641, Ann. Cas. 1916 B 1040, 52 L. R. A. (N. S.) 778.

16—This question is fully discussed and the decisions reviewed in **Re Oldfield's Estate, 175 Iowa 118, Ann. Cas. 1917 D 1067, L. R. A. 1916 D 1260**; and in Grover v. Zook, 44 Wash. 489, 120 Am. St. Rep. 1012, 12 Ann. Cas. 192, 7 L. R. A. 582.

marriage to relatives by blood in the third civil degree, that is, to relatives nearer than first cousins; it also prohibited marriage with relatives by affinity in the same degree, that is, with those who had formerly been the husband or wife of a relative in the third degree or nearer.[17]

17—Two systems of reckoning the degrees of consanguinity were known to the early English law: that of the canon, or Papal law, and that of the civil, or Imperial Roman law. The canon law determined the degrees of relationship by counting the steps of descent from the common ancestor to the most remote of the two persons whose relationship was to be estimated; thus either first cousins, or uncle and nephew, were related in the second degree, there being two steps from each cousin in the first case, and from the nephew in the second, to the grandfather who was the common ancestor. By the civil law the degree of relationship was determined by counting the steps from one of the persons in question up to the common ancestor, and then down to the other; by this method first cousins were related in the fourth degree, and uncle and nephew in the third degree; counting from myself, the steps are: my father one, my grandfather two, my uncle three, my cousin four.

The ecclesiastical courts, which had jurisdiction of both the distribution of estates and of the dissolution of marriages, applied the canon law to both questions; but in the anti-papal revolution under Henry VIII it was enacted (Stat. 32 Henry VIII, c. 38) that "nothing, God's law excepted, shall impeach any marriage but within the Levitical degrees." The courts interpreted this phrase as meaning within, that is, nearer than, the fourth degree computed by the civil law; and this was henceforth the canonical rule of the English church and its ecclesiastical courts. The marriage of first cousins was therefore permitted, but that of all nearer relations prohibited. 1 Bl. Comm. 435, Chitty's notes to that page, and to 2 Bl. Comm. 207.

The history of the English law on this subject is sketched in the note, L. R. A. 1916 C 724-7, and (as to relationship by affinity) in the same volume, pp. 756-8.

See 2 Pollock & Maitland's History of English Law, 383-7, as to the degrees of kin, and the extravagant extension of the doctrine of relationship by affinity in the early ecclesiastical courts.

It is matter of common knowledge that efforts were made for many years to procure the passage by the British Parliament of an act to permit the marriage of a man with his deceased wife's sister, and that such an act was passed in 1907 (Gen. Stat. 1907, c. 47). It was bitterly opposed by a strong body of English sentiment, and on the final vote the bishops voted unanimously against it; though such marriages

In the United States the control of marriages is not vested in the church, though ministers are usually by statute authorized to perform the marriage ceremony; and the prohibitions as to marriage between relatives are such as are defined by the statutes in each particular state. These statutes commonly permit marriages between those related only by affinity, except in the case of very near relationships; prohibiting, for instance, those between a man and his step-mother or mother-in-law, step-daughter or daughter-in-law, but not the more distant relationships by marriage.

As to relationships by consanguinity, all the statutes go as far as the common law, prohibiting marriages between those nearer than first cousins; and about half of the states in the West and Middle West, including no southern state but Arkansas, and no northeastern state but New Hampshire and Pennsylvania, prohibit marriages between first cousins.[18] This rule of law is in sharp contrast with the rule still adhered to in the Roman Catholic church, which prohibits marriage with those related by affinity and also between first cousins. Of course the rule of the church may control the action of its priests, and may be enforced by church discipline, but it does not affect the *legal* validity of the marriage even as between Roman Catholics.

Whether a marriage between persons within the prohibited degree of relationship is void or merely voidable is

are not uncommon in the United States, and are not condemned by public sentiment. The British Act of 1907 applies only to the single case of marriage of a man with his deceased wife's sister; consequently the marriage of a woman with her deceased husband's brother, or of a man with the aunt or niece of his deceased wife, is still prohibited—a curious anomaly.

18—The states and territories in which the marriage of first cousins is prohibited are: Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Washington, Wyoming. Oklahoma extends the prohibition to second cousins.

a question on which the decisions differ, the difference often resting on the varying terms of the respective statutes.[19]

Fifth, the parties must both be unmarried. This requirement is an absolute one. And the fact of an existing marriage of either party renders the new marriage void,[20] however good the faith of the parties may have been, how-

19—See the note, Ann. Cas. 1917 C 151. "It is almost universally stated that they are voidable only, unless expressly declared void by statute." Note, L. R. A. 1916 C 723.

20—In Riddlesen v. Wogan, Croke Eliz. 858, *anno* 1601, the coverture of defendant was pleaded to a bond; replication that her husband had another wife living at the time of his marriage to defendant, which after the obligation was annulled therefor. Replication held good, "because the marriage is merely void, and therefore there needed not any such sentence of divorce; for it was void *ab initio*, and she always sole." Pride v. Earls of Bath, 1 Salk. 120; Martin v. Martin, 22 Ala. 86; Goset v. Goset, 112 Ark. 47, L. R. A. 1916 C 707 and note 711-719; Tefft v. Tefft, 35 Ind. 44; Fenton v. Reed, 4 Johns. Cas. (N. Y.) 52; Heffner v. Heffner, 23 Pa. St. 104; Thomas v. Thomas, 124 Pa. St. 646; White v. White, 105 Mass. 325, 7 Am. Rep. 526.

Since the marriage is *ab initio* void, no decree of nullity is essential, for the purpose of avoiding it; but the removal of doubt as to the fact, and the certain determination of the parties' status, makes it desirable that a decree should be procured declaring the nullity of such a marriage. The court however will not grant such a decree on the petition of a woman after her husband's death, where the marriage relation has been maintained until his death. Rawson v. Rawson, 156 Mass. 578. Still less will it entertain an action by the heirs of a man to set aside a divorce granted to him several years before, in order to render void a marriage which he subsequently contracted, where the marriage was not questioned during his life, and the plaintiff's interest is merely to prevent the widow from taking her property right as such. Tyler v. Aspinwall, 73 Conn. 493.

In the analogous case where one of the parties had been divorced with a prohibition of marriage, either permanent or for a specified time, and married contrary to the prohibition, the courts are in dispute whether the marriage is void, or is merely voidable by one of the parties desiring their joint life. See Woodward v. Blake, 38 N. D. 38, Ann. Cas. 1918 E 552 and note, L. R. A. 1918 A 88; and see the note, L. R. A. 1916 C 748-52. As to the situation when the marriage takes place in another state, see *post*, § 41.

ever long the former husband or wife of one of the parties may have been missing, and however great reason there may have been for supposing that the former wife or husband of one of the parties was dead.[21]

Statutes have been passed in England and in many of the states to relieve those who have in good faith contracted a second marriage, where the former husband or wife had been absent a certain number of years and was supposed in good faith to be dead, in two respects: first, declaring that the parties should not be prosecuted for bigamy, and, second, giving the children the status of legitimate children. Such laws are commonly called Enoch Arden laws, in reference to the well-known story related by Tennyson. And acts have been passed in California, Minnesota, New York and Tennessee providing that the second marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority.[22]

21—Re Wilson's Trusts, L. R. 1 Eq. Cas. 247, 259, 263; Martin v. Martin, 22 Ala. 86; Wilson v. Allen, 108 Ga. 275; Teter v. Teter, 88 Ind. 494; Pain v. Pain, 37 Mo. Ap. 110; Webster v. Webster, 58 N. H. 3; Fenton v. Reed, 4 Johns. Cas. (N. Y.) 52.

22—1 Cooley's Blackstone, 436. See Civil Code of Cal., § 61, (2); Gen. Stat. of Minn., (1913), § 7106; Domestic Relations law, N. Y., Art. 11, § 6 (3), § 7 (4); Civil Code of Tenn. § 4188.

Of the New York statute it has been said in the case of **Gall v. Gall, 114 N. Y. 109:** "The first marriage is suspended or placed in abeyance: but it is not reinstated by the return of the absentee, because the second marriage becomes void only from the time that it is so declared by a competent court; otherwise, both marriages would be in force at the same time, and to this extent polygamy would be sanctioned by law. The first marriage ceases to be binding until one of the three parties to the two marriages procures a decree pronouncing the second marriage void." The effect of the New York statute is again fully discussed in Price v. Price, 124 N. Y. 589, 12 L. R. A. 359. See also Snuffer v. Karr, 197 Mo. 182, 7 Ann. Cas. 780.

It follows that the living together of the parties to the second marriage is not adulterous, and the first husband has no remedy for divorce. His marital status has been suspended by the statute; but he can maintain an action to annul the second marriage, and if the parties continue to cohabit after a decree of annulment, their intercourse would

§ 39. The marriage ceremony or contract. The parties, being qualified to intermarry, must also have in fact entered into the marriage contract in the manner required by law. By the common law as it was understood in England at the time of the colonization of the United States, and as it was adopted and declared by the American courts, no ceremony of marriage was necessary—no declaration of the marriage, that is, by a magistrate or minister, or even the presence of such migistrate or minister. The parties need only exchange declarations of their present agreement to enter into the marriage relation.

The old maxim is: *consensus, non concubitus, facit nuptias;* and the rule became formulated as follows: consent *per verba de praesenti,* with or without consummation, constitutes a common law marriage; or consent *per verba de futuro,* followed by consummation.[23] The first part of

then be adulterous, and the first husband mght procure a divorce for such adultery. Vallean v. Vallean, 6 Paige Ch. (N. Y.) 207.

But in order to give the second marriage the protection of this statute, it must have been contracted in entire good faith—that is, in an honest belief that the absent spouse was in fact dead, and after an honest effort to learn the facts about him or her. Gall v. Gall, *ut supra.*

As to the effect of such a statute on the legitimacy on the children in another state, see Moore v. Saxton, 90 Conn. 164, Ann. Cas. 1917 C 534.

23—2 Kent's Com. 87; **Meister v. Moore, 96 U. S. 76;** Hutchins v. Kimmel, 31 Mich. 126, 18 Am. Rep. 164; Graham v. Bennett, 2 Cal. 503; Londonderry v. Chester, 2 N. H. 265; Fenton v. Reed, 4 Johns. Cas. (N. Y.) 52; Jackson v. Wynne, 7 Wend. (N. Y.) 47; Clayton v. Wardell, 4 N. Y. 230.

See the extended discussion of common law marriages in the notes, L. R. A. 1915 E 8, 60, 91, 113.

In 1844, in Regina v. Millis, 10 Clark & Finnelly 534, the House of Lords decided, by an equal division of the law lords, that the so-called common law marriage was not in fact a valid marriage by the common law of England. The case was a prosecution for bigamy. The accused, a member of the established (Episcopal) Church of Ireland, was married to a Presbyterian woman in Ireland by the Presbyterian minister regularly settled in her parish, with the rites of the Presbyterian church. After living sometime with this wife he left her and married another woman in a parish church in England. In the

Irish Court of King's Bench he was held not guilty by an equal division of the judges, and on appeal to the House of Lords the decision was affirmed by an equal division of the lords. The judges who read opinions for acquittal admitted that the ecclesiastical courts, in whose hands is the principal jurisdiction of matrimonial matters, recognized such informal marriages as valid; but held that by the common law they had only a qualified effect and did not confer a true marital status. Lord Lyndhurst spoke as follows (p. 857-8): "I have come, therefore, to this conclusion, that although a marriage contracted *per verba de praesenti* was indissoluble—though it could not be released even by the mutual consent of the parties—though either of them might enforce it, and compel solemnization—though it had the effect of rendering a subsequent marriage solemnized *in facie ecclesiae*, even after cohabitation and the birth of children, voidable—though it was considered to be of the essence and substance of matrimony, and was therefore, and on account of its indissoluble character, styled in the ecclesiastical law *verum matrimonium*, yet by the law of England, according to the concurrent opinion of both the ecclesiastical and temporal lawyers, this irregular and looser sort of marriages did not confer those rights of property, or the more important right of legitimacy, consequent on a marriage duly solemnized according to the rites of the church."

It is singular to find the law lords thus taking a view which exaggerates the functions of the clergy of the established church to a point which they themselves, in the ecclesiastical courts, have never claimed. Pollock and Maitland have with very great learning criticised this decision, concluding with the observation: "If the victorious cause please the lords, it is the vanquished cause that will please the historian of the middle ages." 2 Pollock & Maitland, Hist. of the Eng. Law, 370. This decision, though rendered by an equal division of the lords, was held to be binding and to establish the law of England in the subsequent case of Beamish v. Beamish, 9 H. L. C. 274. It has become of little practical importance in England, because of the passage of statutes defining the requisites of a valid marriage, and recognizing those performed by dissenting ministers.

Whatever doubt may be cast upon the true doctrine of the English common law by this decision, it did not affect the recognition of the informal marriage, which was already firmly established as the common law of the United States. The Supreme Court of the United States has said: "That marriage might be validly contracted by mutual promises alone, or what were called *sponsalia de praesenti*, without the presence or benediction of a priest, was an established principle of civil and canon law antecedent to the Council of Trent. Whether such a marriage was sufficient by the common law in England, previous to the Mar-

this formula has lately received careful examination and criticism, and it has been held that *verba de praesenti* do not constitute a marriage unless followed by marital cohabitation.[24] And though the latter part has been repeated from time immemorial by text writers and in decided cases, it is manifestly an incorrect statement of the law. If an agreement for future marriage followed by cohabitation constituted a valid marriage, then every case of seduction under promise of marriage would be a legal marriage in fact. The true rule is that there must be a present consent to enter into the marriage relation. The fact of cohabitation, following on a previous agreement to marry, affords strong evidence that the parties agree now to carry into effect their former agreement. If, however, there was no intent at the time of the intercourse to form the marriage relation, such intercourse has no effect to constitute the parties husband and wife. The two forms really differ only in the way in which the fact is to be proven. The requisite fact in both cases is the agreement, mutually entered into, to be now and henceforth husband and wife.[25]

riage Act, has been disputed of late years in that county, though never doubted here." Hallett v. Collins, 10 How. (U. S.) 181. See also the American decision quoted at the beginning of this note.

The very distinguished editor of the 6th Edition of Kent's Commentaries (O. W. Holmes, Jr.) states that the Supreme Court of the United States was also equally divided as to the validity of a common law marriage in Jewell v. Jewell, 1 How. (U. S.) 219, but this is an error; the question was as to the local law of Georgia and South Carolina. The latter cases already cited show that the view of the Supreme Court as to the doctrine of the American common law is entirely free from doubt.

24—**Grigsby v. Reib, 105 Tex. 597, Ann. Cas. 1915 C 1011, L. R. A. 1915 E 1 and note;** Herd v. Herd, 194 Ala. 613, L. R. A. 1916 A 1243.

25—**Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609 and note;** Robertson v. State, 42 Ala. 509; Judson v. Judson, 147 Mich. 518; Stoltz v. Doering, 112 Ill. 234; Duncan v. Duncan, 10 Ohio St. 181; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105; Peck v. Peck, 12 R. I. 488, 34 Am. Rep. 702. Pollock and Maitland say of the *verba de praesenti* and *verba de futuro* rule: "The scheme at which they thus arrived was certainly no masterpiece of human

The interesting question has occasionally arisen whether if a man and woman begin living together unlawfully, one of them being already married to another, and, after the impediment to their marriage is removed by death or divorce, continue to cohabit without any new ceremony or contract, the continued cohabitation affords evidence of a marriage formed by mutual consent. Both the better reason and the weight of authority seem to be that such facts do not constitute a marriage; the presumption is that the old consent to live together unlawfully is still the basis of their relation, rather than an imaginary new contract to marry, which has no existence in fact.[26] But if they were both ignorant of the impediment, and supposing in good faith that the former spouse was dead entered into a contract of marriage, it would seem that the rule should be different. Here the parties in fact intended in the beginning to form a valid marriage relation; presumably they would not have lived together except as lawful husband and wife. When, after the impediment was in fact removed, they continue to cohabit, they do so intending to be husband and wife, and the fact that hitherto rendered their purpose unavailing has now ceased to exist. Their subsequent cohabitation should be treated as marital, and as effecting a valid common law marriage.[27] If one party

wisdom. Of all people in the world, lovers are the least likely to distinguish precisely between the present and the future tenses." 2 P. and M. Hist. of Eng. Law, 367.

26—**Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105;** Lapsley v. Grierson, 1 H. L. C. 498; Compton v. Benham, 44 Ind. Ap. 51; Duncan v. Duncan, 10 Ohio St. 181; Palmer v. Cully, 52 Okla. 454, Ann. Cas. 1918 E 375. *Contra*, the Breadalbane case, L. R. 1 Sc. Ap. 182.

27—**Eaton v. Eaton, 66 Neb. 676, 60 L. R. A. 605, 1 Ann. Cas. 202;** DeThoren v. Attorney-General, 1 L. R. App. Cas. 686. See Travers v. Reinhardt, 205 U. S. 423.

In Chamberlain v. Chamberlain, 68 N. J. Eq. 736, 111 Am. St. Rep. 658, 3 L. R. A. (N. S.) 244, 6 Ann. Cas. 483 and note; and in Collins v. Voorhees, 46 N. J. Eq. 411, 47 N. J. Eq. 315, 355, 19 Am. St. Rep. 404, 24 Am. St. Rep. 412, 14 L. R. A. 364, the distinction made in the text between a marriage relation which began innocently, and one

knew of the impediment and the other did not, the same result should follow in reason and judgment. In this case, after the removal of the impediment one party continues to maintain marital relations in the belief that they are lawful; the other also acts and holds himself out as a husband or wife, knowing that the innocent spouse believes their relation to be that of lawful matrimony; each daily by his acts says to the other and to all the world, "We are husband and wife." There is nothing to prevent the implication of a common law marriage. But as to the result in this situation, or as to the general distinction above indicated, the cases are not fully uniform.[28]

By statutes passed in almost every English-speaking jurisdiction, the parties are required to make their declaration of marriage before a proper magistrate, or before such

which began meretriciously, is strongly affirmed.

In Robinson v. Ruprecht, 191 Ill. 424, a couple married, each of whom had a living spouse. They believed the former husband to be dead, but knew that the former wife was living. Soon after they heard of her death. The former husband also died. It was held that they contracted a common law marriage by their subsequent open and public life as husband and wife.

In People v. Shaw, 259 Ill. 544, L. R. A. 1915 E 87, the parties were married in New York, after a divorce which was void by the N. Y. law. They removed to Illinois, where such a divorce would have been valid, and there lived together. Held, that no marriage resulted, as they did not intend to form a new marriage, but rested on their supposed N. Y. marriage.

28—In Cartwright v. McGown and Compton v. Benham, cited in note 26, and in Collins v. Voorhees, cited in note 27, a marital status was held not to result, where the original relations were innocent on the part of one and guilty on the part of the other. The Breadalbane case held that marriage did result, though both parties were guilty; and Travers v. Reinhardt, where one was innocent and the other guilty. Davis v. Whitlock, 90 S. C. 233, Ann. Cas. 1913 D 538, and Smith v. Reed, 145 Ga. 724, L. R. A. 1917 A 492, also declare that marriage results if one party is innocent and the other guilty.

In Massachusetts by statute, "if such marriage was entered into by one of the parties in good faith," the cohabitation constitutes a legal marriage "from and after the removal of such impediment." That act has been held to be valid, and to apply although the original marriage was before the passage

ministers of religion as are constituted by the statutes magistrates for that purpose. And in most of the states they are required to procure a license beforehand, in obtaining which they must state under oath the facts necessary to make their intended marriage valid. But unless the statute expressly declares any marriage to be void which is not celebrated according to its provisions, a common law marriage is still valid.[29]

Judges and text-writers sometimes speak of a marriage by cohabitation and reputation, as if this were a mode of contracting marriage other than by the ceremonial marriage or the common law marriage. It is evident, however, that this is an inexact mode of speech. If a man and woman have lived together as man and wife, holding themselves out as such, and supposed to be such by all their neighbors and relatives, a court may well presume from that fact that they have been married; but this is a mere evidential presumption. If it is made to appear that in fact they never were married, their cohabitation and the mistaken belief of the community, however universal, will not make them man and wife.[30] That such cohabitation and reputation are

of the act, if the removal of the impediment and the subsequent cohabitation were after its passage. Lufkin v. Lufkin, 182 Mass. 476.

29—Meister v. Moore, 96 U. S. 76; Parton v. Hervey, 1 Gray (Mass.) 119; Snuffer v. Karr, 197 Mo. 182, 7 Ann. Cas. 780; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105; Renfrow v. Renfrow, 60 Kan. 277, 72 Am. St. Rep. 350; State v. Bittick, 103 Mo. 183, 23 Am. St. Rep. 869, 11 L. R. A. 587; Ziegler v. Cassidy, 220 N. Y. 98, Ann. Cas. 1917 E 248; 587; Reaves v. Reaves, 15 Okla. 240, 2 L. R. A. (N. S.) 353 and note; Re Love, 42 Okla. 478, L. R. A. 1915 E 109 and note; Becker v. Becker, 153 Wis. 226, L. R. A. 1915 E 56. *Contra*, Smith v. North Memphis Savings Bank, 115 Tenn. 12. Other decisions (such as Offield v. Davis, 100 Va. 250) rest on an express or implied negative in the terms of the statute; but in Smith v. North Memphis Savings Bank the statute contains no such language. In Snuffer v. Karr, *supra*, the Missouri court gave a contrary construction to the same Tennessee statute.

See the very full notes, Ann. Cas. 1912 D 598, and L. R. A. 1915 E 91-108.

30—**Travers v. Reinhardt**, 205 U. S. 423, goes to the very verge of the law in this respect, the court saying (page 440): "It was

merely evidence of a marriage, and not a marriage in themselves, is clearly shown by the rule that in prosecutions for bigamy or other criminal offenses to which a prior marriage is essential there must be actual proof of a ceremonial or common law marriage.[31]

§ 40. **Duress or fraud in the marriage contract.** Not only must the marriage have been entered into in fact, but it must not have been procured by force or fraud. Cases of annulment of marriage under this head are rare, as indeed are cases of annulment for any cause. Of course the marriage would not be annulled for any trivial or slight cause. The urgent and even threatening persuasion of one party by the other or by friends, deceitful statements as to age, property or previous moral character, or even as to

to be deemed a valid marriage in New Jersey after James Travers and the woman Sophia, as husband and wife, took up their permanent residence there and lived together in that relation, continuously, in good faith and openly up to the death of Travers, being regarded by themselves and in the community as husband and wife. Their conduct towards each other in the eye of the public while in New Jersey, taken in connection with their previous association, was equivalent in law to a declaration by each that they did, and during their joint lives were to occupy the relation of husband and wife. Such a declaration was as effective to establish the status of marriage in New Jersey as if it had been made in words of the present tense after they became domiciled in that state." In this case the couple had lived several years in two other states, where it was held that no valid marriage had occurred, and then came into New Jersey.

For the general doctrine on this subject, see DeThoren v. Attorney-General., L. R. 1 App. Cas. 686; Hammick v. Bronson, 5 Day (Conn.) 290; Newburyport v. Boothbay, 9 Mass. 414; White v. White, 82 Cal. 427, 7 L. R. A. 799; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105; Re Maher, 183 Ill. 61; Jackson v. Jackson, 80 Md. 176; Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Am. St. Rep. 4040; Hynes v. McDermott, 91 N. Y. 451, 43 Am. Rep. 677; Gall v. Gall, 114 N. Y. 109; Smith v. North Memphis Sav. Bk., 115 Tenn. 12; Nims v. Thompson, 83 Wis. 261, 17 L. R. A. 847.

31—Hiler v. People, 156 Ill. 511, 47 Am. St. Rep. 221; Commonwealth v. Littlejohn, 15 Mass. 153; Hayes v. People, 25 N. Y. 390, 82 Am. Dec. 364.

the parties having once been married, [34-39] all these are insufficient so long as there was not such force as to absolutely take away the power of consenting from the party, nor such fraud as to wholly mislead him or her as to the act which he was performing, or, at least, to defraud him or her as to the essential elements of the marriage.

Cases of annulment of marriage by reason of duress are not frequent in the American reports; but the law is well settled that such force or threats as destroy the free will of a party, so that he or she goes through the marriage ceremony not voluntarily, but under the influence of overpowering fear, is sufficient ground for setting aside the marriage.[32] That one party is induced reluctantly to marry the other because of a bastardy prosecution, or other legal process growing out of their illicit relations, is not sufficient to invalidate the marriage, if the proceed-

32—**Avakian v. Avakian, 69 N. J. Eq. 89;** Ferlat v. Gojon, Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554; Shoro v. Shoro, 60 Vt. 268, 6 Am. St. Rep. 118.

The leading English cases are Scott v. Seebright, L. R. 12 Pr. D. 21, and Cooper v. Crane (1891) Pr. 369. In the former case the court said: "The courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract. True it is, that in contracts of marriage there is an interest involved above and beyond that of the immediate parties. Public policy requires that marriages should not be lightly set aside, and there is in some cases the strongest temptation to the parties more immediately interested to act in collusion in procuring a dissolution of the marriage tie. These reasons necessitate great care and circumspection on the part of the tribunal; but they in no wise alter the principle or the ground on which this, like any other contract, may be avoided." In Cooper v. Crane, *supra*, the court refused to set aside a marriage between two cousins, which the wife had consented to upon the husband's threat that if she should not marry him he would blow out his brains, and she would be responsible, where it appeared that she went through the ceremony without any sign of fear or unwillingness, and signed the register in a clear, firm hand.

ings in question were lawful, and instituted in good faith, although the intention was to compel a marriage.[33]

Cases of fraud are somewhat more frequent. The rule is that the fraud proven must relate to the essential elements of the marriage relation itself, and not to its mere incidents or surrounding circumstances. A greater measure of fraud is required to justify annulling a marriage than would suffice to avoid an ordinary contract.[34] Thus, con-

33—**Wimbrough v. Wimbrough, 125 Md. 619, Ann. Cas. 1916 E 920;** Jackson v. Winne, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563; Frost v. Frost, 42 N. J. Eq. 55; Collins v. Ryan, 40 La. An. 1710, 43 L. R. A. 814; Thome v. Farrar, 57 Wash. 441, 27 L. R. A. (N. S.) 385, 135 Am. St. Rep. 995; Marvin v. Marvin, 52 Ark. 425, 20 Am. St. Rep. 191. This is still clearer when the statute expressly provided that a prosecution for seduction might be satisfied by the accused marrying the victim. State v. English, 101 S. C. 304, L. R. A. 1915 F 977. But in Shoro v. Shoro, 60 Vt. 286, 6 Am. St. Rep. 118, where a wholly unfounded accusation was made against a sixteen year old boy by an older woman of bad reputation, and he was unable to procure bail and was threatened with imprisonment, and was advised by his father and an officer in whose custody he was to marry the woman and then leave her, the marriage was annulled for force and fraud.

34—"When in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as produces the appearance without the reality of consent. * * * I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled not because of the presence of fraud, but because of the absence of consent. * * * But when there is consent, no fraud inducing that consent is material." Moss v. Moss, (1897) Pr. 268; Fisk v. Fisk, 6 App. Div. (N. Y.) 432; Wier v. Still, 31 Iowa 107.

The New York courts seem to define with less strictness the fraud for which a marriage may be annulled:

"It is a general rule that every misrepresentation of a material fact, made with the intention to induce another to enter into an agreement, and without which he would not have done so, justifies the court in vacating the agreement. * * * There is no valid reason for exempting the marriage contract from the general rule." Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 95 Am. St. Rep. 600, 63 L. R. A. 92; Svenson v. Svenson, 178 N. Y. 54.

The subject of fraud as a ground

cealment of the fact that the intended wife had formerly been insane,[35] that she is now a kleptomaniac,[36] that she had been married before, if the former marriage is not now in force,[37] that she had been unchaste before the marriage,[38] that she falsely represented that she had had no epileptic attack for eight years, and was entirely cured of that discase,[39] that the intended husband knew or feared that he had hereditary insanity, and concealed it from his betrothed,[40] have all been held to be insufficient to annul a marriage. One extreme form of deceit has especially been held to be such as to invalidate a marriage—namely, where a woman, believed by her husband to be chaste, is found to have been at time of marriage pregnant by another man.[41]

for annulment of a marriage is fully discussed, with an extensive review of the cases in Gatto v. Gatto, 106 Atl. 493 (N. H. 1919).

A marriage which has never been consummated by marital intercourse will be more readily annulled than one where there has been consummation and cohabitation.

"It is evident that, the marriage not having been consummated, the usual considerations of public policy which apply to a case where the relation has by consummation of the marriage ripened into a public status do not exist here. There was between these parties little more than a contract to marry." Svenson v. Svenson, *supra*.

35—Cummington v. Belchertown, 149 Mass. 223, 4 L. R. A. 131.

36—**Lewis v. Lewis, 44 Minn. 124, 20 Am. St. Rep. 559, 9 L. R. A. 505.**

37—Donnelly v. Strong, 175 Mass. 157; Fisk v. Fisk, 6 App. Div. (N. Y.) 432.

38—Allen's Appeal, 99 Pa. St. 196, 44 Am. Rep. 101. *Contra*, **Browning v. Browning, 89 Kan. 98, Ann. Cas. 1914 C 1288 and extensive note, L. R. A. 1916 C 737;** Gatto v. Gatto, 106 Atl. 493 (N. H. 1919).

39—Lyon v. Lyon, 230 Ill. 366, 13 L. R. A. (N. S.) 996; but in Gould v. Gould, 78 Conn. 242, 2 L. R. A. (N. S.) 531, the concealment of epilepsy was held sufficient in view of a statute which prohibited the marriage of an epileptic person.

40—Allen v. Allen, 85 N. J. Eq. 55.

41—Reynolds v. Reynolds, 3 Allen (Mass.) 605; Carris v. Carris, 24 N. J. Eq. 516; Wallace v. Wallace, 137 Iowa 37, 136 Am. St. Rep. 253 and note, 14 L. R. A. (N. S.) 544 and note, 15 Ann. Cas. 761.

It is held in most of the cases that the husband cannot claim a divorce or annulment on this

The fact of the infection of one of the parties by syphilis to such an extent as to make marital intercourse impossible or dangerous, which was concealed from the other party, has also been held to be such a fraud as to invalidate the marriage.[42] That one of the parties went through the marriage ceremony with the intention of being married in form only and to refuse consummation of the marriage, and after marriage persisted in such refusal, constitutes fraud sufficient to avoid the marriage.[43]

The effect of either force or fraud is to render the marriage voidable, and not void; if, therefore, the injured party, after removal of the duress or after discovery of the fraud, voluntarily continues marital relations,[44] the marriage is ratified and becomes unassailable.

§ 41. Conflict of laws as to marriage. The diversity of local laws as to the requirements of a valid marriage make important the question, what effect will be given to a marriage valid where it occurred, but invalid in the jurisdiction where the parties lived or to which they afterward go. There are evident inconveniences in the rule that marriages valid where made are valid everywhere. It renders

ground if he had himself been guilty of pre-marital intercourse with his wife; but in a recent well considered case this rule has been held not to be an absolute and unconditioned one. Lyman v. Lyman, 90 Conn. 399, L. R. A. 1916 E 643 and note.

42—Smith v. Smith, 171 Mass. 404, 68 Am. St. Rep. 440, 41 L. R. A. 800; Crane v. Crane, 62 N. J. Eq. 21.

43—Anders v. Anders, 224 Mass. 438, L. R. A. 1916 E 1273 and note; Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918 E 184, L. R. A. 1918 B 415. And see Johnson v. Johnson, 176 Ala. 449, Ann. Cas. 1915 A 828 and note, 39 L. R. A. (N. S.) 518.

44—Prine v. Prine, 36 Fla. 676, 34 L. R. A. 87; Hampstead v. Plaistow, 49 N. H. 84; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 95 Am. St. Rep. 609, 63 L. R. A. 92; Harrison v. Harrison, 94 Mich. 559. See Perry v. Perry, 2 Paige Ch. (N. Y.) 501.

That no person except the married spouse can maintain an action to declare a marriage void for force or fraud, see Re Hallopeter, 52 Wash. 41, 132 Am. St. Rep. 952, 21 L. R. A. (N. S.) 847; Ridgely v. Ridgely, 79 Md. 298, 25 L. R. A. 800.

it possible for parties to evade the law of their own state, by going to another where the laws are more liberal. For instance, the laws of Connecticut require minors to procure the written consent of their parents in order to be married; no such requirement existed in New York until 1907. Consequently scores of Connecticut young people, whose parents would not consent to their marriage, took the train for the first town within the state of New York, where they married, and then returned to defy their parents and the local law of their state. Gretna Green, the border town of Scotland, to which runaway couples used to go from England, is famous in fiction and in legend.

On the other hand, New York grants divorces only upon the express provision that the guilty party is still bound by the mariage contract and prohibited to remarry; but such persons, if they go into Connecticut or New Jersey, may marry there and return to New York to live in defiance of its laws and courts.

But the alternative of holding that people lawfully married in one state are unmarried in another would lead to so much greater difficulty, that the rule is generally established that marriages valid where contracted are valid everywhere, unless it is otherwise expressly provided by the statute of the forum, or unless the law of the place of the marriage is so flagrantly opposed to the laws of the jurisdiction where the question is tried that the marriage is deemed offensive to Christian morals; as if, for instance, it were incestuous or polygamous.[45]

45—**Commonwealth v. Lane, 113 Mass. 458, 18 Am. Rep. 509;** Dalrymple v. Dalrymple, 2 Hagg. Cons. 54; Dannelli v. Dannelli, 4 Bush. (Ky.) 51; Hutchins v. Kimmel, 31 Mich. 126, 18 Am. Rep. 164; Van Voorhis v. Brintnall, 86 N. Y. 18; State v. Ross, 76 N. C. 242, 22 Am. Rep. 678; Norman v. Norman, 131 Cal. 620, 66 Am. St. Rep. 74, 42 L. R. A. 343; Garcia v. Garcia, 25 S. Dak. 645, 32 L. R. A. (N. S.) 424, Ann. Cas. 1912 C 621.

But see Cunningham v. Cunningham, 206 N. Y. 341, 43 L. R. A. (N. S.) 335, and note, in which case the N. Y. court emphasized the power of a state over the status of its own citizens, and annulled a marriage contracted by

A situation of difficulty is that above mentioned where

N. Y. parties who went to New Jersey to evade the N. Y. law, the marriage never having been consummated. The court however recognized the general rule as stated in the text.

In Norman v. Norman, *supra*, the rule was held not to validate a marriage which was celebrated on the high seas in evasion of the law of California, of which the parties were citizens; there being no known marriage law of the high seas by which the marriage could be supported.

A much more strict view is indicated by the English cases of Hyde v. Hyde, 1 Pr. & Div. 130 (a Mormon marriage in Utah), and Bethell v. Hillyard, 38 Ch. D. 220 (a marriage with a South African woman); in both cases the English courts refused to recognize the marriages.

In Washington a marriage between first cousins, being forbidden by the law of that state, is held to be incestuous and therefore void, when the parties went from that state to another for the purpose of evading the prohibition. Johnson v. Johnson, 57 Wash. 89, 26 L. R. A. (N. S.) 179; State v. Nakashima, 62 Wash. 686, Ann. Cas. 1912 D 220.

But in Maryland a marriage between uncle and niece, though voidable if celebrated in that state, was held not incestuous; and that such a marriage in a state where it was lawful would be recognized in Maryland, though the parties lived in Maryland and went to the other state to evade the law of their domicil. The court quotes an earlier Maryland decision that incestuous marriages "according to the generally accepted opinion of Christendom" were only those between persons in the direct line of descent, and between brother and sister. Fensterwald v. Burk, 129 Md. 131, 3 A. L. R. 1562.

In **Ex p. Chace, 26 R. I. 351, 3 Ann. Cas. 1050 and note, 69 L. R. A. 493,** after a very careful discussion of the cases, the court affirms the general principle that the capacity to marry is to be determined by the law of the state of the marriage rather than by that of the domicil of the parties, and that most, if not all, of the cases which seem opposed to that doctrine come within the exceptions stated in the text.

The effect of differing local sentiment is shown by the decision in Massachusetts that a marriage between a white and a colored person, if celebrated in a state where it is valid, will be recognized, though prohibited by the Mass. statute (Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131); while the contrary has been held in several southern states. Dupre v. Boulard, 10 La. An. 411; State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683; Kinney v. Com., 30. Gratt (Va.) 858, 32 Am. Rep. 690.

Such a marriage has lately been recognized in Florida as valid, where the parties lived in Kansas at the time of the marriage, and thereafter until their death. Whittington v. McKasell, 65 Fla.

a divorce has been granted in one state, and by the terms of the divorce decree the guilty party is prohibited from remarrying, and thereafter the party subject to such prohibition goes to another state and is married there. Most of the earlier cases hold that in such a case the marriage is valid, even though the parties went into the second state to evade the law of the first and established no permanent residence there;[46] but in many recent cases the courts have refused to follow the general rule under those circumstances.[47]

162, Ann. Cas. 1915 B 1001, 44 L. R. A. (N. S.) 630.

46—**Van Voorhis v. Brentnall, 86 N. Y. 18, 40 Am. Rep. 505;** Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189; Moore v. Hegeman, 92 N. Y. 521, 44 Am. Rep. 408; Putnam v. Putnam, 8 Pick. (Mass.) 433; State v. Shattuck, 69 Vt. 403, 60 Am. St. Rep. 936, 40 L. R. A. 428; State v. Richardson, 72 Vt. 49; Phillips v. Madrid, 83 Me. 205, 12 L. R. A. 862; Dudley v. Dudley, 151 Iowa 142, 32 L. R. A. (N. S.) 1170.

47—Stull's Estate, 183 Pa. St. 625, 39 L. R. A. 539; Penuegar v. State, 87 Tenn. 244, 2 L. R. A. 703; Williams v. Oates, 5 Ired. L. N. C.) 535; Wilson v. Cook, 256 Ill. 460, 43 L. R. A. (N. S.) 365; State v. Fenn, 47 Wash. 561, 17 L. R. A. (N. S.) 800; **Lanham v. Lanham, 136 Wis. 360, 128 Am. St. Rep. 1085, 17 L. R. A. (N. S.) 804.**

And see the note, Ann. Cas. 1918 E 1074.

CHAPTER IX

DIVORCE.

§ 42. Diversity of opinion as to divorce legislation. Probably there is no subject of legislation as to the propriety of which there is greater difference of opinion on the part of people of substantially similar moral, political and religious views, than on that of divorce. Connecticut, settled by the Puritans and, anciently at least, called "the land of steady habits," authorizes absolute divorces to be granted for several different grounds; New York, the most cosmopolitan of all our states in population and traditions, for adultery only. North Carolina in 1887 had a strict divorce law, allowing absolute divorce only for adultery or for causes which really show the marriage to have been void and fraudulent *ab initio;* in 1887, 1889, 1895 and 1899, additional causes for divorce were created, making the law comparatively liberal; in 1905 these were all repealed and the law restored to its former simplicity. Five grounds for limited divorce are also defined by the law of that state.[1] South Carolina on the other hand, having had prior to 1878 four grounds for absolute divorce, in that year repealed all of the laws by which either absolute divorce or limited divorce could be granted, and has since then retained a stricter law on this subject than any other American state.[2]

The churches agree little better than the states. The Roman Catholic church declares marriage to be a sacrament indissoluble even for adultery, though it sanctions actions for the annulment of marriage for causes which

1—U. S. Census Report on Mge. & Div., 1909. Part I, p. 311.

2—*Idem*, p. 318.

rendered it void *ab initio.* Many Protestants, following the words of Jesus: "Every one that putteth away his wife, saving for the cause of fornication, maketh her an adulteress; and whosoever shall marry her when she is put away committeth adultery"[3]—oppose the granting of any divorce except for adultery; while others deem these words applicable only to the divorce system of the ancient Jews. By the Hebrew law, as in ancient society in general, divorce was the arbitrary privilege of the husband, to be exercised at his mere whim, to which the wife had no corresponding right; it was a part of the general system of slavery of the wife and unrestrained power on the part of the husband. The modern divorce system by which the marriage is dissolved by an impartial tribunal, upon proof of the gross breach of the marriage relation, and, in the great majority of cases, to free a suffering wife from bondage to a drunken or brutal husband, or one who has totally deserted her, is certainly a very different thing in its moral aspect from the Jewish or Roman divorce.

I think it may fairly be said that the great majority of clergymen, approaching the question from the religious standpoint, actuated largely by a sacramental conception of marriage, and viewing the question primarily in regard to the moral effect upon society in general, favor a strict limitation of the right of divorce, confining it at least to cases of breach of the marriage contract by adultery; while the great majority of the legal profession, familiar with the question in its individual application rather than as a matter of social ethics, meeting the cases of insult and violence to which women are constantly exposed by the intemperance or brutality of their husbands, feel that to permit release from bonds which have ceased to have anything of actual sacredness, and have become bonds of the most galling slavery, is but a consistent part of the humanity and consideration shown to women and the pro-

3—Matthew, v: 32.

tection thrown about them by modern law. But it is not the part of a legal treatise to discuse the ethics of divorce, nor what the law should be, but what it is.[4]

§ 43. **Divorce distinguished from annulment of marriage.** In the first place we must distinguish a divorce properly so-called, that is, a judgment of court by which an existing and valid marriage relation is terminated, from a judgment annulling a marriage because it was void *ab initio*. If a marriage entered into in fact is not legally a marriage, whether because of the relationship or other incapacity of the parties, or because of force or fraud entering into the marriage contract, an action may be brought to procure a judgment declaring such invalidity, and adjudging the apparent marriage to be no marriage.[5] But such actions, while in theory differing very widely from divorce actions proper, are in practice closely connected with them.

4—The Census Bureau of the United States published in 1908 and 1909 an exhaustive study of marriage and divorce in the United States, contained in two large volumes and covering forty years from 1867 to 1906. These volumes make a complete exhibit of the legislation in relation to marriage and divorce during that period in each American state, and of the corresponding legislation in the principal foreign countries of the world, and give statistics of marriages and divorces in the United States and in foreign countries with great completeness, analyzed by years, by states, by proportion to population, by the causes for which divorces were granted, and the party (husband or wife) to whom they were granted, and by every mode of classification likely to be useful in legal or in sociological investigation.

This report will hereinafter be referred to as Census Report.

In 1919 the Census Bureau supplemented this report by publishing similar statistics for the single year 1916.

Some of the general results of these investigations are given in the appendix at the end of this chapter.

5—"Strictly speaking, the word 'divorce' means a dissolution of the bonds of matrimony, based upon the theory of a valid marriage, for some cause arising after the marriage; while an annulment proceeding is maintained upon the theory that, for some cause existing at the time of the marriage, no valid marriage ever existed." Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918 E 184.

The statutes of nearly all the states define as grounds for divorce causes which really show the original nullity of the marriage. And it will not be necessary to further discuss the action for the annulment of a marriage.

§ 44. **Absolute and limited divorces.** Divorces are of two kinds: divorces *a vinculo matrimonii*, from the bond of marriage, often called absolute divorces, which put an end to the marriage relation and render the parties single; and divorces *a mensa et thoro*, from bed and board, or limited divorces, more accurately called judicial separations, in which the marriage relation is not dissolved, but the injured party is given the right to live separate from the other.

At the common law the courts had no jurisdiction to grant divorces *a vinculo*. The ecclesiastical courts could declare the marriage void for causes occuring prior thereto, or could grant a divorce *a mensa et thoro* for subsequent causes; but divorces *a vinculo* were only granted by special act of parliament.[6] But at the present time,

6—Parliament refused to entertain a petition for such an act until the petitioner had proved the matrimonial offense in a suit at law, and also obtained a divorce *a mensa et thoro* in the ecclesiastical court. The process therefore became extremely cumbersome and expensive, and of course was only available to those of great wealth.

The creation of a court for Divorce and Matrimonial Causes is said to have been due largely to the effect on public opinion of an address to the prisoner delivered by Mr. Justice Maule in sentencing a poor bigamist. "I will tell you what you ought to have done under the circumstances, and if you say you did not know, I must tell you that the law conclusively presumes that you did. You should have instructed your attorney to bring an action against the seducer of your wife for damages. That would have cost you about £100. Having proceeded thus far, you should have employed a proctor and instituted a suit in the ecclesiastical courts for a divorce *a mensa et thoro*. That would have cost you £200 or £300 more. When you had obtained a divorce *a mensa et thoro* you had only to obtain a private act of Parliament for a divorce *a vinculo matrimonii*. This bill might possibly have been opposed in all of its stages in both Houses of Parliament, and altogether these proceedings would have cost you £1,000. You will probably say

both in England and in all the American states, the courts grant whatever divorces are permitted by the legal policy of the state.[7]

In more than half of the American states no distinction is made between degrees of divorce, and all divorces are absolute; that is, from the bond of marriage. Of the states which distinguish between the two classes of divorce, some provide that the more serious causes shall be grounds for absolute divorce, and the lesser for limited divorce, while others give discretion to the court to grant either an absolute or a limited divorce as it shall deem best in each particular case.[8] The conference of delegates from the several states, summoned together in 1906 by Governor Pennypacker of Pennsylvania, to consider the possibility of legislation

that you never had a tenth of that sum, but that makes no difference. Sitting here as an English judge, it is my duty to tell you that this is not a country where there is one law for the rich and another for the poor. You will be imprisoned for one day." (Select Essays in Anglo-American Legal History, 1907, I 536, 798.)

A divorce court was soon after created by act of Parliament, but an action for a divorce in England is said to be still so expensive that it is resorted to only by the wealthy. The gain to public morality of a system which limits divorce litigation by denying it to any but the rich may fairly be doubted. A commission appointed by Parliament to consider the English divorce laws made a report late in 1912, dissented from by a minority headed by the Archbishop of York, in which they recommended increasing the number of causes for divorce, so as to make them substantially like those of the more conservative American states, abolishing the present discrimination against women as to the grounds which justify a divorce, and giving jurisdiction to the local courts to grant divorces, thus lessening the cost of divorce proceedings. This report met with very vigorous criticism and opposition, and its recommendations have not yet been adopted.

7—Legislative divorces may still be granted in Connecticut; but only ten such divorces have been granted in that state in twenty years, usually for hopeless insanity. Census Report, I 283; Private Acts of Conn., 1909, ch. 238.

In Delaware legislative divorces were frequent until 1897, when they were prohibited by a constitutional amendment. Census Report, I, 284.

8—See the table of causes for divorce, Census Report, I, 268-9.

uniform throughout the Union on the subject of marriage and divorce, among other recommendations urged the grant in every state of the power to grant limited divorces. The reason actuating the convention in that recommendation seems to have been that a means of escape from cruelty and oppression by such decree of limited divorce might be provided to those whose conscientious scruples or church discipline would not allow them to apply for an absolute dissolution of their marriage.[9]

§ 45. The causes for divorce. *Adultery* is everywhere the primary cause for divorce, and absolute divorce may be granted for that cause in every Anglo-American jurisdiction except South Carolina.[10] It is unfortunate that the word "adultery" is used in different fields of the law with quite different definitions. Adultery in the view of the criminal law includes only the unlawful intercourse of a man with a married woman; such intercourse with an unmarried woman constituting merely fornication.[11] The di-

9—See an account of this conference and the text of the bill proposed by it for uniform adoption in Census Report, I, 271-4.

10—In England, in Kentucky and in Texas, the law upon this point discriminates in favor of the husband, the mere fact of adultery by the wife being sufficient to entitle the husband to a divorce; while there must be a "living in adultery," Ky. Stat. § 2117, or abandonment and living in adultery, Tex. Civil Stat. Art. 4631, or cruelty or desertion coupled with adultery (Eng.) on the husband's part to constitute cause for divorce.

A like discrimination in North Carolina was abolished by statute in 1905. Census Report, I, 27, 294, 311, 320.

11—State v. Lash, 16 N. J. L. 380, 32 Am. Dec. 397; Hood v. State, 56 Ind. 271, 26 Am. Rep. 21.

In Massachusetts the courts have followed the analogy of the divorce law in their interpretation of the criminal law, and held that a married man who has intercourse with a single woman is guilty of adultery. But this doctrine is recognized to be a departure from the common law. Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284. It is also held that a married man who commits rape is guilty of adultery, and may be indicted for either crime. Com. v. Bakeman, 131 Mass. 577, 41 Am. Rep. 248.

A similar departure from the common law definition of adultery has been made in Wisconsin (State

vorce law however, looking primarily to the offense against the marriage bond, regards the sexual intercourse of either spouse with any person of the opposite sex, whether married or unmarried, as an equal offense; and the term "adultery" includes what in criminal law is known as fornication, and includes also rape, as well as criminal adultery.[12] There must be, however, not merely the physical act of intercourse but the consenting mind. So that if a married woman is the victim of a rape, or if either party commits unlawful intercourse while insane,[13] it is not cause for a divorce.[14]

Other causes which are commonly grounds for divorce are cruelty, desertion and intemperance.

In all but two or three of the states *cruelty* is a ground for absolute divorce; and in the others for limited divorce, South Carolina only excepted. In several of the states divorces for this cause are granted to the wife only.

The states commonly qualify the term "cruelty" as to its degree. For instance, in Connecticut the requisite for a di-

v. Fellows, 50 Wisc. 65); in Kansas (Bashford v. Wells, 78 Kan. 295, 18 L. R. A. (N. S.) 580); and in Illinois (Lyman v. People, 198 Ill. 544). In several states a like change has been effected by statute.

See on this subject the note, 18 L. R. A. (N. S.) 580.

12—Pickett v. Pickett, 27 Minn. 299; Johnson v. Johnson, 78 N. J. Eq. 507.

13—**Nicholas v. Nicholas, 31 Vt. 328, 73 Am. Dec. 352 and note.** For other cases see *ante*, § 25, note 33.

14—So where one remains under an honest mistake of fact as to the dissolution of a prior marriage, her cohabitation with a supposed second husband is not adultery in the eye of the divorce law. Smith v. Smith, 64 Iowa 682; Valleau v. Valleau, 6 Paige Ch. (N. Y.) 207.

Aliter, where she is negligent in ascertaining the facts, or the mistake is of law rather than of fact. Gordon v. Gordon, 141 Ill. 160, 33 Am. St. Rep. 294, 21 L. R. A. 387; Moors v. Moors, 121 Mass. 232.

A wife who married after 21 years absence of her husband and after reports had been received of his death, and continued to live with her second husband after the return of the first, was barred by such continuance of her illegal marital relations from obtaining a divorce from the returned wanderer. Mathewson v. Mathewson, 18 R. I. 456, 49 Am. St. Rep. 782.

vorce is "intolerable cruelty," which has been defined to mean "barbarous, savage, inhuman acts, of such a character as to be in fact intolerable,—not to be borne."[15] Many cases have said that the cruelty must be such as to cause "danger to life, limb or health." In the earlier cases physical violence was held essential to constitute cruelty; but many later cases hold that abusive and insulting language may be sufficient, if in fact it produces such mental suffering as to impair the health, or render a continuance of the marital relation degrading and unendurable.[16] In several

15—Shaw v. Shaw, 17 Conn. 193.

16—As illustrations of the stricter line of cases, see **Mathewson v. Mathewson, 81 Vt. 173, 18 L. R. A. (N. S.) 300;** Maddox v. Maddox, 189 Ill. 152, 82 Am. St. Rep. 431, 52 L. R. A. 628; Shaw v. Shaw, 17 Conn. 193; Casey v. Casey, 83 N. J. Eq. 603; Prall v. Prall, 58 Fla 496, 26 L. R. A. (N. S.) 577; Ring v. Ring, 118 Ga. 183, 62 L. R. A. 878. Of cases where divorces have been granted for cruelty consisting chiefly or entirely of outrageous and abusive language, unfounded accusations, &c., see Waltermire v. Waltermire, 110 N. Y. 183; Braun v. Braun, 194 Pa. St. 287, 75 Am. St. Rep. 699; Mosher v. Mosher, 16 N. D. 269, 12 L. R. A. (N. S.) 280; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660; Palmer v. Palmer, 45 Mich. 150, 40 Am. Rep. 461; Miller v. Miller, 89 Neb. 239, 34 L. R. A. (N. S.) 360.

"It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now generally held that any unjustifiable conduct on the part of either husband or wife, which so grievously wounds the mental feelings of the other, and so utterly destroys the peace of mind, as to seriously impair the bodily health or endanger the life of the other, or such as in any other manner endangers the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes 'extreme cruelty' within the statutes, although no physical or personal violence may be inflicted or even threatened." Carpenter v. Carpenter, 30 Kan. 712, 744, 46 Am. Rep. 108. See also Hiecke v. Hiecke, 163 Wis. 171, Ann. Cas. 1918 B 497.

In Williamson v. Williamson 183 Ky. 435, 3 A. L. R. 799 and note, compelling a wife to abandon her children by a former marriage, and in Thompson v. Thompson, 205 Mich. 124, 3 A. L. R. 990 and note, subjecting her to abuse and insult from his rela-

of the states the expression "personal indignities rendering life burdensome" or some equivalent phrase is used, indicating a less strict requirement as to the degree of cruelty.[17]

Desertion is in most of the states a ground for divorce; commonly characterized as "total," "wilful," "with total abandonment of all the duties of the marriage relation," and so forth.[18] The term during which desertion must have con-

tives, were held to constitute cruelty justifying a divorce.

In **Robinson v. Robinson, 66 N. H. 400, 49 Am. St. Rep. 632, 15 L. R. A. 121,** the adoption by the wife of Christian Science beliefs and entering professionally into its practice was held to constitute cruelty warranting a divorce, where in fact the plaintiff's health was seriously injured by his mortification and distress, and she refused to abandon her practice.

Dishonesty and fraud practiced upon creditors, not with intent to annoy the wife, are not "extreme cruelty," within the divorce law, though she suffered mentally and physically by reason of such acts. McClenahan v. McClenahan, 2 Boyce (Del.) 599.

"Such acts of cruelty may consist as well in the infliction of mental suffering as of bodily violence." Colorado Code, quoted in Census Report, I, 282.

The question whether unfounded accusations of adultery or other lewd conduct constitute cruelty within the divorce law is very fully discussed in the note. 18 L. R. A. (N. S.) 300, and 34 L. R. A. (N. S.) 360.

The House of Lords has recently held (by five of the Law Lords against four) that charges of an infamous character by the wife against her husband do not constitute cruelty; the opinions fully review the English decisions. Russell v. Russell (1897) A. C. 308.

By the code of Louisiana, "public defamation" of one spouse by the other is cause for divorce. Census Report, I, 295.

17—Arkansas, Indian Territory, Missouri, Oregon, Tennessee, Washington, Wyoming. In North Carolina and Pennsylvania limited, but not absolute, divorce may be granted for such "personal indignities." Census Report, I, 277-328.

18—Under these statutes the conduct of the defendant must have been an unqualified and complete abandonment of all marital duties. A partial repudiation of such duties, as by failure of the husband to support the wife, or refusal of sexual intercourse by either party, is insufficient to constitute the offense of desertion. Fritts v. Fritts, 138 Ill. 436, 32 Am. St. Rep. 156, 14 L. R. A. 685 and note; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Watson v. Watson, 52 N. J. Eq. 349; Wills v. Wills, 74 W. Va. 709, L. R. A. 1915 B 770 and note. The present rule in New Jersey makes per-

tinued is five years in one state,[19] three years in fourteen, two years in ten, and one year in seventeen. The recommendation of the inter-state conference already mentioned was that two years should be made the minimum period of desertion to authorize a divorce.[20]

Desertion may be constructive; that is, if one party should by his or her bad conduct drive away the other or give reasonable justification to the injured party for leaving the offender, the separation would be regarded as a desertion of the innocent party by the guilty, although the innocent party may have been the one actually leaving the marital abode.[21]

sistent refusal of sexual intercourse without justification or excuse "desertion" within the divorce acts. Rector v. Rector, 78 N. J. Eq. 386; Raymond v. Raymond, 79 Atl. 430 (N. J.) not officially reported. Danforth v. Danforth, 88 Me. 120, 51 Am. St. Rep. 380, 31 L. R. A. 608, holds that a persistent and unreasonable desertion of the husband was not broken by permitting a two or three days visit at her home.

Refusal by an English woman, whose husband had emigrated to the United States and had obtained employment here, to follow him to this country when he requested her to come and sent her money for her passage, was held to be desertion by her, it being found that she had no other reason for her refusal than reluctance to leave her native land. **Franklin v. Franklin, 190 Mass. 349, 4 L. R. A. (N. S.) 145 and note.** See also *post*, § 56, note 12.

19—Rhode Island; but the court in its discretion may grant a divorce for a shorter period of desertion. Gen. Laws R. I., Ch. 247, note 2.

20—Census Report, I, 268, 274.

21—**Hudson v. Hudson, 59 Fla. 529, 138 Am. St. Rep. 141 and note, 29 L. R. A. (N. S.) 614 and note, 21 Ann. Cas. 278 and note;** Warner v. Warner, 54 Mich. 492; McVickar v. McVickar, 46 N. J. Eq. 490, 19 Am. St. Rep. 422; Lister v. Lister, 65 N. J. Eq. 109; James v. James, 58 N. H. 266; Setzer v. Setzer, 128 N. C. 170, 83 Am. St. Rep. 666.

Contra, Pidge, v Pidge, 3 Metc. (Mass.) 257; Paddleford v. Paddleford, 159 Mass. 281.

As to the rule in Indiana, see Summers v. Summers, 179 Ind. 8.

"It is true that when a husband brings his mistress into his house and so makes it impossible for a wife to live there, he practically drives his wife from his home, and his act may be characterized as desertion; but in the case of an adulterous act or acts by the husband with a woman at places other than the dwelling-house of the parties such an inference does

Grounds similar to desertion are in many of the states imprisonment for crime, in nineteen of the states failure of the husband to support the wife, in six of the states "willful neglect."[22]

Habitual intemperance, or "gross and confirmed habits of intoxication," constitute a ground for divorce in the great majority of the states. In defining the degree of intemperate habits which meets these definitions our courts have held that there must be not merely such habits of intemperance as to cause annoyance and distress to the innocent party, but such as to practically interfere with the performance of the person's usual work and expose the other party to suffering and want. The decision necessarily rests much in the discretion of the trial court.[23]

not arise. While such an adulterous act might justify a wife in separating from her husband, it is not ground for inferring a constructive desertion by him." Lake v. Lake, 65 N. J. Eq. 544.

As to when a separation is excusable, and when it constitutes desertion, see Tipton v. Tipton, 169 Iowa 182, Ann. Cas. 1916 C 360.

Justification of the wife's departure by the unkind conduct of her husband's relatives. Fraser v. Fraser, 87 N. J. Eq. 633, L. R. A. 1917 F 738; and see the note Ann. Cas. 1914 B 628.

See also, *post,* § 56, note 17.

As to the duty of the deserted party to make efforts for a reconciliation as a prerequisite to a divorce action, see Hill v. Hill, 62 Fla. 493, 39 L. R. A. (N. S.) 1117 and full note.

22—Census Report, I, 268, and the summary of state laws following.

In North Carolina ten years separation, though by the fault of the plaintiff, is sufficient cause for a divorce, if there are no children. Cooke v. Cooke, 164 N. C. 272, 41 L. R. A. (N. S.) 1034.

23—**Dennis v. Dennis, 68 Conn. 186, 57 Am. St. Rep. 95, 34 L. R. A. 499;** O'Kane v. O'Kane, 103 Ark. 382, 40 L. R. A. (N. S.) 655. Page v. Page, 43 Wash. 293, 117 Am. St. Rep. 1054, 6 L. R. A. (N. S.) 914, defines the offense rather more favorably to the complainant, saying: "To be an habitual drunkard a person does not have to be drunk all the time, nor necessarily incapacitated from pursuing during the working hours of the day ordinary unskilled manual labor. * * * It is enough that he have the habit so firmly fixed upon him that he becomes drunk with recurring frequence periodically, or that he is unable to resist when the opportunity and temptation is presented." In this case a divorce

§ 46. Defenses peculiar to the divorce action. There are certain defenses peculiar to the divorce action: recrimination, connivance, condonation and collusion.

Recrimination is the defense that the plaintiff also is guilty of misconduct constituting cause for divorce. By the common law no misconduct of the husband except adultery could bar him from obtaining a divorce for the misconduct of the wife; and by the statutes of several of the states recrimination only applies when the action is for the defendant's adultery and the defendant proves that the plaintiff also has been guilty of adultery.[24] But by the prevailing doctrine of the American cases, where no statutory distinction is made between the different causes for divorce, any cause which is sufficient for the granting of a divorce is sufficient to bar the obtaining of a divorce by the guilty party, though he proves an offense of a different character. If, therefore, the plaintiff is proven guilty of cruelty or intemperance sufficiently extreme to constitute a cause for di-

was granted for habitual drunkenness, although the defendant had worked steadily, and his employer had never known him to be drunk or seen him take a drink.

See also McBee v. McBee, 22 Oregon 329, 29 Am. St. Rep. 613, and other cases cited in the notes 6 L. R. A. (N. S.) 914, and 40 L. R. A. (N. S.) 655.

24—The defense appears to be limited to mutual charges of adultery by the statutes of Alabama, Arkansas, Delaware, Florida, Illinois, Indiana, Maine, Minnesota, Missouri, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Texas. It is held in Illinois that this statutory provision is only declaratory of the common law, and does not limit it; adultery as the more serious charge is therefore held to be a good defense to charges of cruelty. Decker v. Decker, 193 Ill. 285, 86 Am. St. Rep. 325, 55 L. R. A. 697. Nagel v. Nagel, 12 Mo. 53, and Redington v. Redington, 2 Colo. Ap. 8, hold that any offense which is cause for a divorce will bar the guilty party from getting a divorce for any other cause, notwithstanding the limitation in the language of the statute; this Colorado decision was rendered in 1892, and in 1893 the statute was altered so as to make recrimination generally a defense. On the other hand in Ristine v. Ristine, 4 Rawle (Pa.) 460, and Buerfening v. Buerfening, 23 Minn. 563, the statute was held to limit the scope of this defense so that adultery is no bar to a decree for drunkenness and cruelty.

vorce, he cannot obtain a divorce for the defendant's adultery.[25]

Connivance is the defense that the plaintiff consented, either passively or actively, to the conduct of the defendant of which he now complains. It often arises where one party, suspecting the other of a guilty inclination, puts facilities in the other's way, hoping that he or she may commit an offense and thereby enable the plaintiff to procure a divorce. But merely watching the defendant to obtain evidence of wrongful acts, if there is no effort to induce him or her to commit them, nor putting of opportunities in the way, does not constitute connivance.[26]

In Kansas the refusal of a divorce upon proof of adultery by the plaintiff is in the discretion of the court.

25—**Green v. Green, 125 Md. 141, Ann. Cas. 1917 A 625 and note, L. R. A. 1915 E 972 and note;** Ribet v. Ribet, 39 Ala. 348; Conant v. Conant, 10 Cal. 250, 70 Am. Dec. 717; Redington v. Redington, 2 Colo. App. 8; Hall v. Hall, 4 Allen (Mass.) 39; Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476; Nagel v. Nagel, 12 Mo. 53; Church v. Church, 16 R. I. 667, 7 L. R. A. 385; Tillison v. Tillison, 63 Vt. 411; Pease v. Pease, 72 Wis. 136.

The real difference between the two lines of cases seems to turn on the question whether adultery should or should not be treated by the courts as "a more serious charge" than other offenses which are constituted ground for divorce.

The prevailing view seems to be that expressed in Pease v. Pease, *supra*: "In the forum of conscience, adultery by the wife may be regarded as a more heinous violation of social duty than cruelty by the husband, but the statute treats them as of the same nature and same grade of delinquency. It is true that the cruelty of the husband does not justify the adultery of the wife, neither would his own adultery; but still the latter has ever been held a bar. And where both adultery and cruelty are made equal offenses, attended with the same legal consequences, how can the court in the mutual controversy discriminate between the two, and give one a preference over the other? It seems to us that, as the law has given the same effect to the one offense as the other, the court should not attempt to distinguish between them, but treat them alike and hold one a bar to the other."

26—Farwell v. Farwell, 47 Mont. 574, Ann. Cas. 1915 C 78 and note.

A comparison of the facts which were held not to constitute connivance in **Wilson v. Wilson, 154 Mass. 194, 26 Am. St. Rep. 237,**

Condonation is the defense that the plaintiff, after knowledge of the offense, forgave it, and continued or renewed marital relations with the guilty party. Ordinarily the living in marital relations with the guilty party after knowledge of the offense is proof of condonation. If however the wife is the complainant, condonation will not be so strongly imputed against her, for she may have been dependent upon the husband and practically unable to leave him immediately, even after discovery of his infidelity.[27] But whether the plaintiff be husband or wife, if there has been an actual forgiveness and overlooking of the offense and the continuance of marital relations, the offense is thereby blotted out and cannot afterward be asserted as grounds for a divorce.[28]

12 L. R. A. 524, with those which were held to show connivance in Dennis v. Dennis, 68 Conn. 186, 57 Am. St. Rep. 95, 34 L. R. A. 449, will clearly show the nature of the defense, and illustrate the distinction stated in the text.

See also Robbins v. Robbins, 140 Mass. 528, 54 Am. Rep. 488.

Connivance at an act of adultery bars the right to obtain a divorce for that act, or for subsequent acts, but it does not prevent the granting of a divorce for prior acts as to which there was no connivance. "The iniquity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct, unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrongful conduct in the particular matter or transaction in respect to which judicial protection or redress is sought." Woodward v. Woodward, 41 N. J. Eq. 224; Morrison v. Morrison, 142 Mass. 261, 56 Am. Rep. 688; Bailey v. Bailey, 67 N. H. 402.

27—**Shackelton v. Shackelton, 48 N. J. Eq. 364, 27 Am. St. Rep. 478;** Duberstein v. Duberstein, 171 Ill. 133; Gardner v. Gardner, 2 Gray (Mass.) 434; Egidi v. Egidi, 37 R. I. 481, Ann. Cas. 1918 A 648.

And see the full notes in regard to condonation, Ann. Cas. 1912 C 3 to 28, and 1918 A 651-663.

28—Shackleton v. Shackleton, *supra;* Owens v. Owens, 96 Va. 191. See also the cases in the following three notes. In some cases it is held that the doctrine of condonation does not apply to bar a divorce for cruelty. It is evident that its application is more difficult in the cases of cruelty, since, while adultery is a completed offense at the commission of a single act, cruelty usually consists of a long course of conduct; whether it has become sufficient to authorize a separation may

An important qualification, however, attends the effect of condonation. Condonation is always conditional on future good behavior. The forgiven party must, to retain the benefit of the pardon, treat the other in the future with conjugal kindness and fidelity. If the defendant is afterward guilty of renewed offenses the forgiveness will be no bar, even though the new offenses were of a different kind, or were not serious enough in themselves to be sufficient ground for divorce.[29] Perhaps the true rule is that a new act of misconduct, if of the same kind, must be of such gravity as to create reasonable fear that the former offense has been or will be repeated.[30]

This question has sometimes arisen: suppose that a party had been guilty of an offense, e. g., adultery, and has been forgiven and marital relations resumed. Afterward the other party is guilty of an offense sufficient to justify a claim for divorce. Can he set up the old offense, which he

often be a question of doubt. It would be harsh to hold that, by enduring cruel treatment until it had become intolerable, the injured party had obliterated all the earlier acts, and could prove only the one which immediately produced the separation. Doe v. Doe, 52 Hun (N. Y.) 405; Phillips v. Phillips, 1 Ill. App. 245; Owens v. Owens, 96 Va. 191; Wolverton v. Wolverton, 163 Ind. 26.

But see Gardner v. Gardner, 2 Gray (Mass.) 434; Sullivan v. Sullivan, 34 Ind. 368.

29—**Egidi v. Egidi, 37 R. I. 481, Ann. Cas. 1918 A 648 and note;** Newsome v. Newsome, L. R. 2 P. & D. 306; Fisher v. Fisher, 98 Md. 298; Shackleton v. Shackleton, 48 N. J. Eq. 364, 27 Am. St. Rep. 478; Duberstein v. Duberstein, 171 Ill. 133; Gardner v. Gardner, 2 Gray (Mass.) 434; Robbins v. Robbins, 100 Mass. 150, 97 Am. Dec. 91; Burr v. Burr, 10 Paige Ch. (N. Y.) 20; Langdon v. Langdon, 25 Vt. 678, 60 Am. Dec. 296; Gordon v. Gordon, 88 N. C. 45, 43 Am. Rep. 729; Craig v. Craig, 129 Iowa 192, 2 L. R. A. (N. S.) 669.

A matrimonial offense which of itself would be cause for a decree of separation only may revive a condoned offense, and thereby entitle the injured party to a divorce *a vinculo*. Dent v. Dent, 4 Sw. & Tr. 105; Blandford v. Blandford, L. R. 8 Pr. D. 19; Newsome v. Newsome, L. R. 2 P. & D. 306.

See Johnson v. Johnson, 14 Wend. (N. Y.) 648.

30—Marshall v. Marshall, 65 Vt. 238; Cochran v. Cochran, 93 Minn. 284; Jefferson v. Jefferson, 168 Mass. 456.

has once condoned, as a defense by way of recrimination? It may seem a hardship that one who has himself freely forgiven an offense should be sued for divorce by the forgiven party because he had been guilty of a similar offense. But it seems a sounder conclusion that if one has forgiven an offense, it is finally and forever wiped out; and it would certainly be intolerable to establish a rule under which one who had once overlooked a fault should thenceforth be free to violate the marriage covenant at will without any redress. And the rule seems well established that an offense, once condoned, cannot afterward be set up in recrimination of a later offense by the other party.[31]

Collusion is an agreement by the two parties to manufacture a case, or to suppress material facts, so that the court may be misled into granting a divorce. This defense, by its very nature, is not commonly set up as such by the defendant. It really implies a conspiracy between the husband and wife, both of whom desire the divorce.

If from the conduct of the parties, or the testimony offered, the court becomes convinced that the parties are in collusion, and that the facts offered in evidence have occurred by agreement between them so that a divorce may be obtained, or that pertinent facts which might constitute a defense are suppressed by agreement, it will refuse to grant the divorce. Doubtless it often happens that the guilty party, desiring the other to procure a divorce, puts her on the track of evidence, or furnishes the necessary money to enable her to bring a divorce action; in extreme cases the parties may even arrange to have incriminating acts occur under such circumstances as to be easily proved in court; if the court learns or has just ground to suspect such collusion, it will refuse the divorce.[32]

31—**Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476;** Talley v. Talley, 215 Pa. St. 281; Jones v. Jones, 18 N. J. Eq. 33.

32—**Fisher v. Fisher, 95 Md. 315, 93 Am. St. Rep. 334;** Thompson v. Thompson, 70 Mich. 62; Branson v. Branson, 76 Neb. 780; Griffiths

It is for fear of collusion also that the courts give little weight to evidence of confessions of guilt by the defendant, unless the circumstances are such as to attach special weight to them and show that they cannot have been made collusively.[33]

§ 47. Divorce actions are sui generis. As a broad general rule, the courts treat divorce actions as cases *sui generis*. Besides the plaintiff and the defendant, there is a third party—the state—interested in the maintenance of sound public policy and good morals. No party has a right to a

v. Griffiths, 69 N. J. Eq. 689.

See the extended note, 2 A. L. R. 699-717.

But the mere fact that actions had been brought by the wife against the husband by which his funds were tied up, and he was thereby coerced into consenting to a divorce, does not constitute such collusion as to justify refusing her a divorce. "Collusion, as that term is used in matrimonial actions, is an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment if the facts were known the court would not grant. Here it is not even suggested that the acts of adultery charged against the defendant, and which it is proved he committed, were procured to be done by the plaintiff or that she connived at the commission of such acts, * * * nor is it even intimated that the evidence by which such acts were proved was furnished by the defendant. * * * It has never before, so far as I know, been claimed that the settlement of financial transactions between a husband or wife at or about the time a divorce is granted is a badge of fraud or collusion, or even a suspicious circumstance requiring investigation." Doeme v. Doeme, 96 App. Div. (N. Y.) 234, 89 N. Y. Supp. 215.

In many of the States collusion is defined, and declared to be ground for the refusal of a divorce by the statute. See Census Report, I, 267, and the digest of statutes following.

33—Fisher v. Fisher, *supra;* Welch v. Welch, 16 Ark. 527; Scott v. Scott, 17 Ind. 309; Summerbell v. Summerbell, 37 N. J. Eq. 603; Betts v. Betts, 1 Johns. Ch. (N. Y.) 197; Matchin v. Matchin, 6 Pa. St. 332, 47 Am. Dec. 466; Baxter v. Baxter, 1 Mass. 346; Holland v. Holland, 2 Mass. 154. And see the note, Ann. Cas. 1913 B 3-14.

But a decree has sometimes been granted where the only evidence was that of a confession of guilt, if the circumstances of the confession convinced the court of its truthfulness and of the absence of collusion. Billings v. Billings, 11 Pick. (Mass.) 461.

divorce unless the court, on all the facts, thinks it consistent with public policy to grant it.[34]

It is in accordance with this principle, and also to prevent collusion, that the courts never grant a divorce judgment by default. Although the defendant may make no effort to defend the charges, or may even formally admit them by his answer, the court will nevertheless require the offenses charged to be proved by testimony satisfactory to itself.[35] In several of the states there are statutes requiring the divorce petition to be served upon some state officer, whose duty it is to investigate the facts, and to oppose the granting of the divorce if public policy requires such opposition.[36]

§ 48. **The validity of foreign divorces.** It is a general principle of international law that every sovereign state has the right to determine the domestic and social status of those having their domicile within its territory. Accordingly the question whether a married couple have been lawfully divorced is to be determined by the laws of the country within which they are domiciled, and a judgment of divorce rendered by the tribunals of that country will be recognized as valid in the courts of other countries.

It was said in a leading English case, and the statement has often been quoted with approval: "The only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views

34—Fisher v. Fisher, *supra;* Allen v. Allen, 73 Conn. 54, 84 Am. St. Rep. 135; Yeager v. Yeager, 43 Ind. Ap. 313; Scott v. Scott, 17 Ind. 309; Eikenbury v. Eikenbury, 33 Ind. Ap. 69; McKin v. McMakin, 68 Mo. Ap. 57; Foster v. Redfield, 50 Vt. 285; Dutcher v. Dutcher, 39 Wisc. 651.

35—See the note, Ann. Cas. 1913 B 7.

36—Smythe v. Smythe, 80 Ore. 150, Ann. Cas. D 1094 and note; Edleson v. Edleson, 179 Ky. 300, 2 A. L. R. 689.

and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."[37]

The English courts made a special exception to that rule, holding, in a case decided in 1812,[38] that a marriage celebrated in England could not be dissolved by the courts of a foreign state, although the husband and wife were domiciled in that state, for reasons which were not sufficient to authorize a divorce by the laws of England. But this decision was carefully reconsidered and finally overthrown by the English Court of Appeal in 1916, and a divorce granted in New York to English subjects, who were married in England, but both of whom afterward came to New York and were domiciled there, was recognized as valid although the divorce would not have been granted upon the facts by the English courts.[39]

The courts of Massachusetts have carried this doctrine to a somewhat extreme extent, holding that a marriage celebrated in the Turkish Empire, between subjects of Turkey then professing the Christian religion, was *ipso facto* dissolved by the conversion of the wife to Mohammedanism and her marriage to a Moslem, although without any adjudication of a court, since the law of Turkey declares a marriage between Christians to become null and void upon the con-

37—Wilson v. Wilson, L. R. 2 P. & D. 435, 442, quoted with approval in Le Mesurier v. Le Mesurier, (1895) A. C. 517, 540, and in Bater v. Bater, and Kapigian v. Der Minassian, *infra*, notes 39 and 40.

38—Lolley's Case, 2 Clark & F. 567.

39—Bater v. Bater, L. R. (1906) Pr. 209, 5 Brit. Rul. Cas. 717 and note.

version to Mohammedanism and remarriage of either of the parties.[40]

In several cases the dissolution of a marriage between American Indians in accordance with Indian custom has also been recognized, although the dissolution was simply the separation of the parties by mutual consent.[41]

§ 49. The validity of divorces granted in other states of the Union. With the wide diversity of divorce legislation in the United States, ranging from the strictness of South Carolina where no divorces are granted, or of New York where no absolute divorce is granted save for adultery, to the extreme liberality of some of the Western states, the question becomes important, what effect will be given in the stricter states to divorces granted in the states where the laws are more liberal?

This question is far more complex as applied to divorce, than the like question as applied to marriage, by reason of two elements: first, the "full faith and credit clause" in the Constitution of the United States; second, the difficulties attending the question of jurisdiction.

The Federal Constitution provides in Article IV, § 1: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Under this provision, a judgment of the courts of one state must be received in another state as having the same effect that a judgment of its own courts would have.

But no judgment of any court is valid in any state unless the court had jurisdiction of the cause;[42] and the question of

40—Kapigian v. Der Minassian, 212 Mass. 412, Ann. Cas. 1913 D 535.

41—Cyr v. Walker, 29 Okla. 281, 35 L. R. A. (N. S.) 795 and note; La Framboise v. Day, 135 Minn. 239, L. R. A. 1917 D 571 and note.

42—Thompson v. Whitman, 18 Wall. (U. S.) 457; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 569.

The doctrine of the text is either stated or tacitly assumed, in its application to divorce judgments, in all cases hereafter cited in this chapter.

jurisdiction is beset with the greatest difficulty in divorce actions.

Suppose a couple, married and having their residence in New York, disagree, and one party leaves the other and goes (let us say) to Nevada. Does the court of Nevada thereby acquire jurisdiction to dissolve the marriage relation of these parties? It may have jurisdiction over the party who has become a resident of Nevada; but what about its jurisdiction over the other party who remains in New York? And over the marriage relation existing between these two parties?

Another element of especial difficulty exists. A great proportion of divorce actions are for desertion; and in many cases of desertion the guilty party has gone to parts unknown. The complainant may not be able, therefore, to give him any actual notice of the bringing of the suit, and of necessity service must be made by publication or in some such way, which may never reach the defendant at all. In some of the states actual notice is not required to be given, but service may be made by publication in a local newspaper, even if the defendant's residence is not shown to be unknown.

Suppose then that in the above case the husband, having gone to Nevada, applies there for a divorce and gets an order of publication in a Nevada newspaper, which the wife remaining in New York never sees. Can this woman, married in New York, residing in New York, be rendered a single woman and deprived of all her marital rights by a proceeding of which she had no knowledge, and upon accusations which she would have been anxious and able to disprove if she had had any opportunity? The objections to a rule that the divorce so granted is conclusive and final to change the status of the defendant in New York are obvious and serious enough.

On the other hand, if a divorce is granted in Nevada and it is held not valid in New York, a couple exist married to

each other in New York, not married in Nevada. The husband can lawfully remarry in Nevada. If he and his new wife come to New York, in that state they are unmarried, their living together is adulterous, and he is the lawful husband of the former wife.

That state of facts would enable a man to have one lawful wife in Nevada and another lawful wife in New York; and this is no fanciful possibility, but is actually permitted by the existing state of the law as defined by the Supreme Court of the United States; and seems to have been the state of things actually created by the decision in Haddock v. Haddock.[43]

§ 50. The conflicting state decisions. The above suggestions indicate the difficulties which inhere in the problem. Let us look at the solutions that have been attempted. The Court of Appeals of New York, maintaining a position consistent with the strict statutory attitude of the state in matters of divorce, held without qualification in 1879 that a divorce granted in another state against a defendant residing in New York, if he was not served with process nor given actual notice and did not appear in the foreign court, had no effect upon the marital status of the defendant;[44] and afterward applied the same rule to a foreign divorce action of which the wife, living in New York, had no legal notice.[45]

In the Atherton case in 1898[46] the same rule was applied by the New York courts, where the defendant had had actual notice of the suit by a copy of the writ mailed to her, but had failed to appear. If, however, upon receiving notice of the pendency of the action, she had gone to the state where it had been brought and there made an unsuccessful

43—201 U. S. 562, 5 Ann. Cas. 1, reviewed at length, *post*, § 52.

44—**People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274.**

45—De Meli v. De Meli, 120 N. Y. 485, 17 Am. St. Rep. 652.

46—Atherton v. Atherton, 155 N. Y. 129, 63 Am. St. Rep. 650, 40 L. R. A. 291.

defense, it was said that she would have been bound by the judgment and not permitted to deny its conclusiveness in the courts of her own state.

On the other hand, most of the states have held that if the plaintiff was an actual resident of the state where the divorce was granted, and if the suit was properly brought and judgment rendered according to the law of that state, whether or not actual notice was given to the defendant, the plaintiff's residence within the state which granted the divorce gave its courts jurisdiction over the plaintiff's status, and that by the dissolution of the marriage as to the plaintiff, it was necessarily dissolved as to the defendant, since, as the Supreme Court of the United States has said: "A husband without a wife, or a wife without a husband, is unknown to the law."[47]

Besides this conflict as to the law, there is in many of the cases a very embarrassing question, partly one of law and partly one of fact, whether the plaintiff really had a *bona fide* residence in the state where the divorce action was brought. Some of the states seem to have competed for the divorce business of the country by making the requirements for divorce conspicuously easy, and especially by making the period of residence in the state necessary to obtain a domicile sufficient to bring a suit very short. North and South Dakota at one time became the undisputed elysium of the divorce hunters, each requiring a residence of only ninety days.

Hundreds of discontented husbands and wives went to one of the Dakotas, lived at a hotel for three months, brought their action, obtained their judgment, and on the next train returned to the state from which they came, and by whose laws they could not have obtained the divorce. This state of things raised the question: were these temporary residents of the state residents at all in the legal sense,

47—In Atherton v. Atherton, 181 U. S. 155, 162.

so as to give the courts of that state jurisdiction over their marital status? Was the finding of the Dakota court, that the plaintiff was a *bona fide* resident of that state, conclusive in the courts of the state to which the parties returned, and where the question as to the validity of the divorce was to be tried?

§ 51. The United States Supreme Court decisions of 1901. This puzzling series of questions, depending as they did on the application of the above quoted provision of the Federal Constitution, could only be settled by the supreme authority of the Supreme Court of the United States; in a series of decisions rendered by that court in 1901, after being sixteen months under consideration after the argument, they were supposed to be in a great measure settled. The first of these cases was Atherton v. Atherton,[48] which reversed the decision of the New York Court of Appeals, and held that if an actual resident of a state brings a divorce action, conducts it according to the law of that state, and obtains a decree valid in that state, it dissolves the marriage relation of the other party to the marriage, although she was a resident of another state, and did not have personal service made upon her nor appear to defend the divorce action. The court said: "The purpose and effect of a decree of divorce from the bond of matrimony, by a court of competent jurisdiction, are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law."

The second case, decided on the same day, was Bell v. Bell,[49] in which it was held that if neither the plaintiff nor the defendant was a *bona fide* resident of the state where the divorce was obtained, "the decree of divorce was entitled to no faith or credit in New York or in any other

48—181 U. S. 155. | 49—181 U. S. 175.

state;" and that the finding by the court granting the divorce that the plaintiff was a *bona fide* resident of the state was not conclusive of the question.

In the third case, Streitwolf v. Streitwolf,[50] the court held that a residence in North Dakota for the bare period of ninety days required by the statute, the party having no occasion for residence there except to procure a divorce, and the evidence satisfying the court that he meant to remain there only until his divorce was obtained, was not a *bona fide* residence such as to give the courts of that state jurisdiction. The divorce granted by the court of that state upon such residence was therefore held to be without jurisdiction, and not to be a valid judgment, either in North Dakota, in New York, or anywhere else. The Bell and Streitwolf cases effectually destroyed the faith theretofore put upon the North Dakota divorces, and so seriously impaired the market value of those documents that the legislature of the state was compelled to revise its divorce statute, so far yielding to the authority of the Federal Supreme Court as to extend the period of residence from three months to one year.[51]

50—181 U. S. 179.

51—North Dakota Laws of 1899, page 94. This act was passed before the decision in the United States Supreme Court, but after the Streitwolf divorce had been declared void by the courts of New Jersey. Streitwolf v. Streitwolf, 58 N. J. Eq. 563, 78 Am. St. Rep. 630.

South Dakota had already in 1893 required six months' residence of the plaintiff in all cases, and a year's residence unless personal service upon the defendant was proven.

South Dakota Civil Code of 1903, 66. Census Report, I, 312, 318.

In 1909 the legislature of South Dakota submitted to the voters of the state a statute, which the voters adopted, so thoroughly reforming the divorce laws of the state that it at once ceased to be the favored abode of the interstate divorce colony; and the distinction thus rejected by South Dakota passed at once to Nevada, where but six months' residence is required, and the practice in divorce actions is "liberal."

In 1913 Nevada also extended the period of residence of the plaintiff to one year. Worthington v. District Court, 37 Nev. 212, L. R. A. 1916 A 696, Ann. Cas. 1916 E 1097.

In Andrews v. Andrews,[52] decided two years later, it was held that the fact that the non-resident defendant appeared in the suit did not help the jurisdiction, and that if neither party was a *bona fide* resident of the state where the divorce was granted the decree was void. This decision logically follows from the decisions in the former cases; since, if the court of a certain state had no jurisdiction to grant a divorce by reason of the attempted residence of the plaintiff, to treat it as obtaining jurisdiction by the appearance of the defendant in court would simply permit the plaintiff and defendant by agreement to confer jurisdiction upon the state having easy divorce laws, instead of permitting such jurisdiction to be conferred by the act of one party alone.

These decisions seemed to have clearly and satisfactorily defined the law as to the jurisdiction of divorce actions. The sole determining question was that of the jurisdiction of the court; and that question depended upon the actual, *bona fide*, legal domicil of one of the parties. If either party had such actual, *bona fide*, domicil within the state, then the courts of that state had jurisdiction over his marital status; and its decree divorcing the plaintiff necessarily divorced the defendant also, even though the defendant might not by any personal action have become a party to the suit or even have had knowledge of its pendency. But if the residence of the plaintiff was only fictitious, resting on a temporary abode within the state for the sole purpose of obtaining a divorce, the courts of that state had no jurisdiction and the decree was not in fact valid either in that state or in any other.

§ 52. **The Haddock case.** These decisions, establishing the binding force of divorces granted in the more liberal states upon the courts of the stricter states, were unsatisfactory to the strong anti-divorce sentiment of a portion of the community. They were still opposed by the great au-

52—188 U. S. 14

thority of the New York courts, which had always maintained ultra-strictness upon this question; and finally in April, 1906, the Supreme Court of the United States reopened the entire question, and by a vote of five judges to four overruled what was commonly supposed to be the effect of the Atherton case, and threw the subject into even greater confusion than existed before By this case, entitled Haddock v. Haddock,[53] the doctrine laid down in the former decisions above reviewed was decisively changed by the establishment of the principle that the dissolution of the marriage as to one party does not necessarily involve its dissolution as to the other party. That is to say, to quote again the phrase from the Atherton case, the Supreme Court now hold that there can be a husband without a wife and a wife without a husband.

The controlling principle of the Haddock case is the supreme power of every state to regulate the status of all persons residing within its jurisdiction. While they recognize the power of the courts of one state to declare unmarried the plaintiff, if he be a resident of that state, they hold that that power cannot diminish the power of another state to recognize as still a married person the other partner who resides in the latter state. So that if, after the separation of a couple, one has obtained a lawful residence in another state and procures a divorce judgment there, this judgment may be valid and the plaintiff may be a single person by the laws of the state where she resides, and may contract a lawful remarriage, and still the courts of the state where the other spouse continues to live are not bound to recognize the effect of the foreign judgment as changing the defendant's status.

The court subordinates the doctrine that every state is bound to give full faith to the judgments of other states to the power of every state to control the status of its own citizens.

53—201 U. S. 562, 5 Ann. Cas. 1.

In the Haddock case the married couple had lived within the state of New York. The husband, having deserted his wife, wandered about for a time and finally became a resident of Connecticut. He obtained a divorce judgment from the courts of that state and remarried within the state. Afterward, upon his going to New York, his former wife brought suit against him for a judicial separation and for alimony. The court of New York granted her the judgment claimed, refusing to recognize the Connecticut divorce because no direct service had been made upon the wife; and the Supreme Court sustained them in this refusal. The exact state of things which has been suggested as an absurd possibility, resulting from the confusion of the law upon this subject, therefore occurred in this case; that is to say, Mr. Haddock was the lawful husband of one woman in Connecticut and of a different woman in New York.

The Supreme Court do not, however, hold that a state may not recognize, if it sees fit to do so as a matter of comity and of the public policy of its own state, divorce judgments of another state. They simply hold that they are not compelled to afford such recognition by the provisions of the federal Constitution.

And in order to make a divorce valid, and therefore entitled to recognition in other states, even when granted by the courts of the state of the matrimonial domicil, there must be notice to the defendant either by service of process or (if the defendant be a nonresident) by such publication or other constructive notice as is required by the law of the state.[54]

Foreign divorce judgments granted in states where the plaintiff had obtained an actual, *bona fide,* residence will doubtless continue to be recognized by the great majority of our states; but the states of New York, California, Maryland, Massachusetts, Vermont, South Carolina, Pennsylvania, and possibly some other states, who have adopted the extreme New York doctrine, are permitted by the rule estab-

54—Thompson v. Thompson, 226 U. S. 551, 562.

lished in the Haddock case to continue to refuse recognition to divorce judgments in other states.[55] Whatever may be its effect in morals and public policy, the great confusion which is thrown into the law of divorce, the extraordinary complications of marital status which may result from it, and the departure from the simplicity and clearness of the rule defined in the Atherton case, are certainly to be deplored.

§ 53. Estoppel to question a divorce judgment. It has been held in several states that if, after one spouse had obtained a divorce which under the rules discussed in this chapter might have been attacked and adjudged invalid, the other spouse remarried after learning of the divorce judgment, he or she is thereby estopped to afterward deny the validity of the divorce and assert rights based on such denial.[56]

55—See the tabulation and analysis of the cases in the state courts in the opinion in Haddock v. Haddock.

Since the decision in the Haddock case, decisions refusing recognition to divorces obtained in other states have been made in California (Bruguiere v. Bruguiere, 172 Cal. 199, Ann. Cas. 1917 E 122), Maryland (Walker v. Walker, 125 Md. 649, Ann. Cas. 1916 B 934), and Massachusetts (Perkins v. Perkins, 225 Mass. 82, L. R. A. 1917 B 1028).

On the other hand Connecticut, Georgia and Missouri have given recognition, on varying states of fact, to divorces granted in other states, and to which they might have refused recognition under the doctrine of the Haddock case. Gildersleeve v. Gildersleeve, 88 Conn. 689 Ann. Cas 1916 B 920; Joyner v. Joyner, 131 Ga. 217, 127 Am. St. Rep. 220, 18 L. R. A. (N. S.) 647; Howard v. Strode, 242 Mo. 210, Ann. Cas. 1913 C 1057. In the Connecticut case the evidence left the *bona fides* of the residence in South Dakota at least questionable.

The Supreme Court of Tennessee, while holding that a divorce judgment in a state where the plaintiff had his actual domicile is conclusive in so far as it puts an end to the marital relation, holds that the question of alimony and other property rights, which were not expressly passed upon in the divorce action, are still open to litigation wherever the question may lawfully arise.

Toncray v. Toncray, 123 Tenn. 476, 34 L. R. A. (N. S.) 1106, Ann. Cas. 1912 C 284.

The recognition of a divorce decree granted in a suit in which no service was made on a nonresident defendant is based on the theory that it acts upon the

In most of these cases the estoppel was asserted against a mere property claim, as where a divorced wife remarried, and after the death of the divorcing husband demanded dower or a distributory share in his estate. But in the most recent case[57] the divorced wife, on being advised that the divorce was invalid, procured an annullment of her later marriage and then sued the divorcing husband for the maintenance of herself and their child. The denial of this claim under the doctrine of estoppel comes perilously near to establishing a divorce by mutual consent.

The plaintiff who sued for and obtained a divorce is also estopped to afterward claim that the divorce was void for lack of jurisdiction.[58]

marital status, and is a judgment in rem; but if the decree was only for a separation, or divorce a mensa et thoro, it is purely in personam, and entitled to no recognition. Pettis v. Pettis, 91 Conn. 608, 4 A. L. R. 852 and note.

56—**Bruguiere v. Bruguiere, 172 Cal. 199, Ann. Cas. 1917 E 122 and note;** Arthur v. Israel, 15 Colo. 147, 22 Am. St. Rep. 381, 10 L. R. A. 693; Mohler v. Shank, 93 Iowa 273, 57 Am. St. Rep. 274, 34 L. R. A. 161; Marvin v. Foster, 61 Minn. 154, 52 Am. St. Rep. 586.

57—Bruguiere v. Bruguiere, *supra*.

58—Laird v. State, 79 Tex. Crim. 129, 3 A. L. R. 522 and note.

APPENDIX TO CHAPTER IX.

THE UNITED STATES CENSUS REPORT ON MARRIAGE AND DIVORCE, 1887-1906; AND THE SUPPLEMENTAL REPORT FOR 1916.

In 1908 and 1909 the United States Census Bureau published the results of an elaborate investigation of marriage and divorce in the United States from 1887 to 1906 inclusive. A summary, prepared by the Bureau for the use of newspapers and other periodicals, contained so much matter of interest in connection with the legal aspects of marriage and divorce that it seemed desirable in preparing the first edition of this text-book to quote at length from it.

In 1919 the Census Bureau issued a supplemental report, giving the statistics of marriage and divorce for the single calendar year of 1916. It seems best to retain the general discussion of the topic as taken from the earlier and fuller report, adding in some cases the corresponding figures for 1916; and also to give a table showing the total number of divorces in each state for the years 1880, 1900, 1906 and 1916, which shows strikingly the steady increase of the divorce ratio.

MARRIAGE RATE.

The marriage rate in the United States in the year 1900 was 93 per 10,000 population. Based upon the adult unmarried (single, widowed, and divorced) population, the rate becomes 321 per 10,000, indicating that in each year something over 6 per cent of the unmarried adult population marry. (The marriage rate for 1916 was 105 per 10,000 population.) The marriage rate based on the total population is higher in the United States than in any other country for which reliable statistics are available. But taking the

marriageable population as the basis—that is, the population which is of marriageable age but not married—the rate in the United States is not as high as it is in Hungary, is about the same as it is in Saxony, but is higher than in any of the other countries included in the comparison.

THE INCREASE IN THE DIVORCE RATE.

The total number of divorces reported for the twenty years, 1887 to 1906 inclusive, was 945,625. For the twenty years, 1867 to 1886 inclusive, the number reported was 328,716, or hardly more than one-third of the number recorded in the second twenty years. At the beginning of the forty-year period divorces occurred at the rate of 10,000 a year; at the end of that period the annual number was about 66,000. (In 1916, 112,036 divorces were granted.) This increase, however, must be considered in connection with the increase in population.

An increase of 30 per cent in population between the years 1870 to 1880 was accompanied by an increase of 79 per cent in the number of divorces granted. In the next decade, 1880 to 1890, the population increased 25 per cent and divorces 70 per cent, and in the following decade, 1890 to 1900, an increase of 21 per cent in population was accompanied by an increase of 66 per cent in the number of divorces. In the six years from 1900 to 1906, population, as estimated, increased 10.5 per cent and divorces 29.3 per cent.

It thus appears that at the end of the forty-year period divorces were increasing about three times as fast as population, while in the first decade (1870 to 1880) they increased only about two and two-thirds as fast. The 1916 report shows an increase in population of 18½ per cent, and in divorces of 55½ per cent, between 1906 and 1916. These figures are not exact, as the population for both those years is estimated; but it shows a continuance of the threefold increase of divorces as compared with population.

The divorce rate per 100,000 population increased from 29 in 1870 to 82 in 1905, and to 112 in 1916. In 1870 there was 1 divorce for every 3,441 persons, in 1905 1 for every 1,218, and in 1916 1 for every 895. Since it is only married people who can become divorced, a more significant divorce rate is that which is based, not upon total population, but upon the total married population. The rate per 100,000 married population was 81 in the year 1870 and 200 in the year 1900. This comparison indicates that divorce was in 1900 two and one-half times as common, compared with married population, as it was thirty years before. A divorce rate of 200 per 100,000 married population is equivalent to 2 per 1,000 maried population. Since 1,000 married people represent 500 married couples, it follows that in each year 4 married couples out of every 1,000 secure a divorce.

This does not mean that only 4 marriages out of 1,000 are terminated by divorce. The rate, it will be noted, is an annual rate, continuously operative, and comes far short of measuring the probability of ultimate divorce. The available data indicate, however, that not less than 1 marriage in 12 is ultimately terminated by divorce.

Divorce rates appear to be much higher in the United States than in any of the foreign countries for which statistics relating to this subject have been obtained.

The number of divorces to 100,000 population, as reported for each state in 1880, 1900, 1906 and 1916 were as follows:

	Divorce Rate Per 100,000 Population.			
State or Territory	1880	1900	1906	1916
Continental United States	38	73	84	112
North Atlantic Division—				
Maine	78	117	108	91
New Hampshire	85	112	112	158
Vermont	47	75	86	116
Massachusetts	30	47	49	63

Rhode Island	93	105	74	101
Connecticut	61	50	54	77
New York	16	23	25	32
New Jersey	13	23	23	40
Pennsylvania	21	35	42	58
South Atlantic Division—				
Delaware	10	16	26	98
Maryland	12	40	55	74
District of Columbia	31	58	28	13
Virginia	11	38	54	91
West Virginia	25	64	86	67
North Carolina	6	24	18	31
South Carolina	1	0	0	0
Georgia	14	26	35	54
Florida	53	79	131	152
North Central Division—				
Ohio	48	91	105	148
Indiana	70	142	154	201
Illinois	68	100	112	139
Michigan	72	104	122	174
Wisconsin	41	65	65	69
Minnesota	27	55	55	86
Iowa	60	93	107	149
Missouri	40	103	122	171
North Dakota	46	88	67	65
South Dakota	48	95	118	84
Nebraska	43	82	104	132
Kansas	44	109	122	143
South Central Division—				
Kentucky	35	84	92	129
Tennessee	38	89	102	127
Alabama	27	69	107	101
Mississippi	30	74	113	104
Louisiana	10	41	57	78

Arkansas	53	136	165	217
Oklahoma	---	129	141	168
Texas	49	131	145	198
Western Division—				
Montana	125	167	151	323
Idaho	58	120	122	189
Wyoming	111	118	114	170
Colorado	138	158	167	113
New Mexico	12	73	79	102
Arizona	47	120	124	240
Utah	114	92	115	152
Nevada	106	111	178	607
Washington	75	184	220	225
Oregon	92	134	179	255
California	84	108	110	190

It will be noticed in the above statistical table that the states where the proportion is very large are almost entirely in the west and southwest. In 1900 no state had a divorce rate of two hundred to one hundred thousand of population. The states which had one hundred and twenty or more were as follows: Washington 184; Montana 167; Colorado 158; Indiana 142; Arkansas 136; Oregon 134; Texas 131; Oklahoma 129; Idaho 129; Arizona 120. The only Atlantic coast state approaching these figures was Maine in which the number of divorces was 117.

In 1916 seven states exceeded 200 to the 100,000 of population: Nevada 607; Montana 323; Oregon 255; Arizona 240; Washington 225; Arkansas 217; and Indiana 201. Sixteen other States exceeded 120. Of these twenty-three states, only one, New Hampshire, was within the North Atlantic division.

Of the states having the fewest divorces South Carolina leads, no divorce having been permitted by law in that state since 1878. The next states in order of scarcity of divorce in 1916 were District of Columbia 13; North

Carolina 31; New York 32; New Jersey 40; Georgia 54, and Pennsylvania 58; but in each case except the District of Columbia this rate was a considerable increase above previous years.

WIVES OBTAIN TWICE AS MANY DIVORCES AS HUSBANDS.

Two-thirds of the total number of divorces granted in the periods covered by these investigations were granted to the wife. This ratio tends to slightly increase; in 1916 31.1 per cent of divorces were obtained by the husband, 68.9 per cent by the wife.

Without any reference to the question of which party is the more frequently responsible for the marital unhappiness that leads to divorce, it may be said that the wife has a legal ground for divorce more frequently than the husband; that is to say, there are certain well-recognized and comparatively common grounds that are more readily applicable as against the husband than as against the wife. Notably there is "neglect to provide" or nonsupport, which, for the husband seeking divorce, is hardly an available ground, although the investigation found six cases in the state of Utah in which the husband obtained a divorce on that ground. Cruelty, although occasionally the ground for divorces granted to husbands, is more generally existent as a cause for the wife's seeking a divorce. Five divorces for cruelty are granted to the wife for every one granted to the husband.

CAUSES OF DIVORCE

The most common single ground for divorce is desertion. This accounted in 1916 for 36.8 per cent of all divorces, almost exactly one-half of those granted to the husband, and 32 per cent of those granted to the wife.

The next most important ground of divorce is, for husbands, adultery, and for wives, cruelty. Of the divorces

granted to husbands in 1916 20.3 per cent were for adultery; and of those granted to wives 33.2 per cent (a greater proportion than for desertion) were for cruelty. Only 7½ per cent of the divorces granted to wives were for adultery of the husband, and 17.4 per cent of divorces granted to husbands were for cruelty on the part of the wife.

Drunkenness was the ground for divorce in 4.5 per cent of the cases in which the wife brought suit, and in 0.8 per cent of the cases in which the suit was brought by the husband.

The above percentages represent those cases in which the specified cause was the sole ground on which the divorce was granted. Very frequently, however, divorces are granted, not upon one ground only, but upon two or more in combination.

In many cases in which drunkenness or intemperance was not recognized in the decree of the court as a ground for divorce it appears to have been present as a contributory influence.

FEW DIVORCE CASES CONTESTED.

From 1887 to 1906, only 15 per cent (in 1916 only 13.6 per cent) of the divorces were returned as contested, and probably in many of these cases the contesting was hardly more than a formality. Of those divorces in which notice upon the defendant was served personally 20 per cent were contested, while in those cases in which notice was served by publication in newspapers only 3 per cent were contested. The latter form of notice is commonly employed where the residence of the defendant is outside the state in which the suit is brought, or is unknown. In about one divorce case out of three the residence of the defendant is either outside the state or is unknown, the percentage residing outside the state being 20.6 per cent, and the percentage for which the residence is unknown being 12.6.

ONE DIVORCED WIFE IN EIGHT GETS ALIMONY.

Alimony was demanded in 18 per cent of the divorces granted to the wife, and was granted in 12.7 per cent. In other words, 3 wives out of 16 to whom divorces were granted asked for alimony, and 2 out of 16, or 1 out of 8, obtained it. In 1916 this proportion was considerably greater. In divorces granted to the wife alimony was asked in 26.7 per cent of the cases, and granted in 19.9 per cent.

DURATION OF DIVORCED MARRIAGES.

The average duration of marriages terminated by divorce is about ten years. Sixty per cent, or three-fifths, last less than ten years and 40 per cent last longer.

The number of divorces occurring in the first year of married life during the entire period of 1887 to 1906 was 18,876; the number increased to 27,764 in the second year of married life, and reached its maximum in the fifth year, when it became 68,770. From that point on the number diminished year by year, but did not fall below the number granted in the first year of married life until the eighteenth year was reached.

The rapidity with which matters come to a crisis in the married careers of divorced couples is more clearly indicated by the number of years which elapsed between marriage and separation. Usually separation precedes divorce by a considerable length of time; and a certain period must necessarily elapse before a divorce can be obtained after the occasion for it arises. The number of years from marriage to separation was ascertained in cases of 770,929 divorced couples. Of these 98,460, or 12.8 per cent, separated in the first year of married life, and 109,689, or 14.2 per cent, in the second year; in the third year the number falls off to 76,102; at the end of the fifth one-half of the total number of separations have taken place. But it is a somewhat surprising fact that 24,143 married couples, or 3.1 per cent of

the total number, separated and became divorced after the completion of twenty-five years of married life.

CHILDREN IN DIVORCE CASES.

Children were reported in 39.8 per cent of the total number of divorced cases. The proportion is much larger for divorces granted to the wife than for divorces granted to the husband; children being present in 46.8 per cent of the former class of divorces and 26 per cent of the latter. A reason suggested for this is that the children are usually assigned by the court to the mother, and to her, therefore, divorce does not imply separation from her children, while to the husband it involves a severance of the parental as well as the marital relation. The corresponding figures for 1916 were: children recorded in 37.7 per cent of all divorces; in 42.2 per cent of divorces obtained by the wife, and in 27.8 per cent of those obtained by the husband.

CHAPTER X

THE PERSONAL RIGHTS OF HUSBAND AND WIFE.

A. As Between Each Other.

§ 54. The general principle. The general principle controlling the rights of husband and wife is not unity, otherwise there could be no reciprocal rights and duties; it is rather the establishment of a family, as the family is understood in Christian civilization, with its close bond of mutual relations, rights and duties. That the husband is the head of the family[1] continues to be more true as to their personal than as to their property rights. Yet that fact—the headship of the husband—grows rather out of the existing and recognized customs of civilization, and the natural qualities of the parties (the greater strength and activity of the man, the greater gentleness and especially the maternal function of the woman), than out of any right of command upon his part. If a husband should seek to reverse the rule of modern society, should decide to cook the meals and attend to the children himself, and order his wife to get employment in the factory to support the family, the theory of the husband's headship would hardly justify his action. It is rather his natural headship, arising from the fact that he supports and maintains the family, and must necessarily determine its expenditures, find and fix the place of abode, determine the manner of life, and have the wife's co-operation in the family life so fixed.

1—Com. v. Wood, 97 Mass. 228; Com. v. Carroll, 124 Mass. 30; Poor v. Poor, 8 N. H. 307, 314; Henley v. Wilson, 137 Cal. 273, 92 Am. St. Rep. 160; Hardenbergh v. Hardenbergh, 14 Cal. 654.

The Married Women's Act was not intended "to absolve a married woman from the duties which she owes to her husband to ren-

The wife takes the husband's name,[2] and his status as a citizen or alien[3]; his change of domicil,[4] or of citizenship,[5] changes hers.

der him service in his household, to care for him and their common children with dutiful affection when he or they need her care, and to render all the services in her household which are commonly expected of a married woman according to her station in life. Nor was it the purpose of the statute to absolve her from due obedience and submission to her husband as head and master of his household, or to depose him from the headship of his family which the common law gave him. He still remains liable to support and protect his wife, and responsible to society for the good order and decency of his household. He is to determine where he and his family shall have a domicile, how his household shall be regulated and managed, and who shall be members of his family." Coleman v. Burr, 93 N. Y. 17, 45 Am. Rep. 160.

2—Fendall v. Goldsmid, 2 Pr. D. 263.

3—See *ante*, § 30.

4—Anderson v. Watt, 138 U. S. 694, 706; Haddock v. Haddock, 201 U. S. 562, 571, 5 Ann. Cas. 4; Kennedy v. Kennedy, 87 Ill. 250; Cone v. Cone, 61 S. C. 512; Parrett v. Palmer, 8 Ind. Ap. 356, 52 Am. St. Rep. 479.

The greater recognition of the separate personal rights of the married woman in moderu law has led the courts to declare in many cases where the husband has deserted her or driven her away from him, and especially in cases where litigation had occurred between them, that the wife had obtained a domicile independent of, and separate from, that of the husband.

But if their personal relations are still those of husband and wife, the common law doctrine remains in force.

"The question raised on the agreed statement of facts is whether a married woman, while the unity of the marriage relation exists undisturbed between them, can acquire a domicile other than that of her husband. In behalf of the plaintiff it is contended that she can. The contention rests on the argument that the common law status of a married woman, by which her legal existence is suspended during the marriage, or merged in that of her husband, has largely ceased to obtain in modern times, and especially in this state, where the law recognizes her as having a separate existence and separate rights as to her property, and consequently separate interests.

After a careful examination of the authorities, however, we have come to the conclusion that, though a wife may acquire a domicile distinct from that of her husband whenever it is necessary or proper for her to do so—as, for instance, where the husband and wife are living apart by mu-

If she is deserted by him, or leaves him for just cause, she acquires a separate domicile, not only for the purpose of bringing a divorce action, but for all purposes.[6]

But if she is living apart from him without sufficient cause, his domicile is still her legal domicile.[7]

§ 55. The duties common to both. It is the duty resting alike upon both to live together in the marital relation, to treat each other with (if not love, at least with) kindness, to co-operate in the maintenance of the home, and in the care of any children of the marriage.[8].

But these duties may cease to exist as against one or the other in certain cases: (a) such causes as will justify a divorce will justify a refusal by the injured party to live longer with the guilty one; (b) often a less offense will justify a separation than would be cause for a divorce. For instance, non-support (not usually a ground of divorce) would make it necessary for the wife in many cases to leave the husband, in order that she might be free to work, or might obtain a home with friends; and so of course it would justify her in leaving him. So a less degree of cruelty would justify a wife in leaving her husband, at least for the time, than would entitle her to a divorce.[9]

tual consent, or where the wife has been abandoned by the husband, or for purposes of divorce, or, in short, whenever the wife has adversary interests to those of the husband—she cannot acquire such a domicile so long as the unity of the marriage relation continues, notwithstanding that from considerations of health, as in the present case, or of expediency, one of the parties, with the consent of the other, is actually living in a different place from the other."

Howland v. Granger, 22 R. I. 1.

5—Kelley v. Owen, 7 Wall. (U. S.) 496; Kircher v. Murray, 54 Fed. 617.

And see, *ante*, §§ 30, 31.

6—**Williamson v. Osenton, 232 U. S. 619.**

7—Anderson v. Watt, 138 U. S. 694, 706. And see the full note, Ann. Cas. 1916 D 397.

8—**Bennett v. Bennett, 116 N. Y. 584, 6 L. R. A. 553;** Foot v. Card, 58 Conn. 1, 18 Am. St. Rep. 215, 6 L. R. A. 829.

9—Watts v. Watts, 160 Mass. 464, 39 Am. St. Rep. 509, 23 L. R. A. 187; Lyster v. Lyster, 111 Mass.

§ 56. The especial duties and rights of the husband. The distinctive duties resting upon the husband are to provide a home, to support the wife and children,[10] to protect her and them from injury or insult. Each of these duties involves the rights requisite to the performance of the duty. Thus, a husband has the same right to protect his wife, to assert and maintain her rights, even to kill a person, if necessary, in her defense, that he would have in his own behalf.[11]

The duty of the husband to provide a home implies his right to select and fix the marital abode. In this respect more than in any other the husband's headship of the family is manifest. The wife must live with him, and not he with her. A refusal on her part to live in the home which he selects or provides, because of a difference of choice between them, would be a breach of her marital obligation and constitute her a deserter.[12]

327; Laing v. Laing, 21 N. J. Eq. 248; Gillinwaters v. Gillinwaters, 28 Mo. 60; Peo. v. Mercein, 8 Paige Ch. (N. Y.) 47, 68.

10—The duty of support will be more fully treated hereafter; see *post*, § 78.

11—Estep v. Com., 86 Ky. 39, 9 Am. St. Rep. 260; Hathaway v. State, 32 Fla. 56.

12—**Franklin v. Franklin, 190 Mass. 349, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851;** Hair v. Hair, 10 Rich. Eq. (S. C.) 163; Hardenbergh v. Hardenbergh, 14 Cal. 654; Babbitt v. Babbitt, 69 Ill. 277; Kennedy v. Kennedy, 87 Ill. 250; Gahn v. Darby, 36 La. Ann. 70; Messenger v. Messenger, 56 Mo. 329; Hunt v. Hunt, 29 N. J. Eq. 96; Isaacs v Isaacs, 71 Neb. 537.

The case of Franklin v. Franklin was that of a man who emigrated to America from England, and when he had obtained a good position wrote to his wife asking her to come to him and sending her money for her passage. Her refusal to leave her native country to join him here was held to be desertion, entitling him to divorce.

Bishop v. Bishop, 30 Pa. St. 412, is directly contrary. The greater difficulty and novelty of the ocean voyage in 1849, as compared with that in 1891, is referred to in Franklin v. Franklin as a ground of distinction between the two cases.

In Copping v. Termini, 135 La. 224, L. R. A. 1915 A 222, the wife's refusal to leave the home of her parents to go with her husband was held excused by her ill health

But the husband must have selected and provided the home in good faith, and in reasonable accordance with his means and their accustomed mode of life.[13] If he should select a location for no reason except that it was obnoxious to the wife, with the intention of driving her to a refusal,[14] or should require her to remove when her health would not permit her to do so safely,[15] or should demand that she leave her home and come to him, when he had in fact provided no home for her,[16] her refusal would be justified. The whole tendency of modern social life is to magnify the wife's right to considerate treatment from the husband, and to make it his duty to provide, within the reasonable limits of his ability, for her comfort and happiness as well as for her mere bodily shelter and food.[17]

and his inability to support the family in a separate home.

In Haymond v. Haymond, 74 Tex. 414, a wife living in Texas was held justified in refusing to follow her husband to a residence in Central America, the court saying: "While this rule (that the husband has the right to change the marital domicile, and the wife must follow him) has been held to apply to emigration to a foreign government as well as to a sister state, other principles, involving among others questions of health and conditions of civilization, give it a limited application."

The fact that before the marriage the husband promised that he would not take the wife away from the neighborhood of her family does not destroy his right to make such removal. Hair v. Hair, 10 Rich. Eq. (S. C.) 163.

13—Walker v. Laighton, 31 N. H. 111; Vosburg v. Vosburg, 136 Cal. 195, 203.

14—Boyce v. Boyce, 23 N. J. Eq. 337; Walker v. Laighton, 31 N. H. 111.

15—Gleason v. Gleason, 4 Wisc. 81.

16—Phelan v. Phelan, 35 Ill. Ap. 511; Turner v. Turner, 26 Ind. Ap. 677. But where the husband has become poor, and is obliged to remove to another city in a search for work, and in good faith urges his wife to come and live with him, she is not justified in refusing because he has no house engaged, and she is expecting childbirth, and is comfortably provided for where she is. Messenger v. Messenger, 56 Mo. 329.

17—Bond v. Bond, 45 Wash. 511.

In Senft v. Carpenter, 18 R. I. 545, the wife was a nervous invalid. The husband insisted on her going to an insane asylum and refused to support her else-

It is also his duty, and consequently his right, to so regulate his household as to assure the maintenance of order and the observance of law. He is therefore liable to prosecution, if the wife carries on the illegal sale of liquor, or the business of prostitution,[18] in the house, even if she be the owner of the house,[19] unless he had actually made *bona fide* efforts to stop such use of the premises, and she had continued it against his will.[20]

where. She then went to a sister's home, who sued the husband for her board and care. The appellate court approved a charge as follows: "When the husband fails and refuses to provide a matrimonial home, and says: 'Here, I will support my wife at such a place, no matter how distasteful it may be to the wife, no matter how unfortunate it may be to her, if her physical condition should be such as to require sympathy and attendance and the loving ministrations of kindred,' * * * that is going further than he has a right to go."

"A wife is neither the slave nor the servant of a husband. He is the head of the house, to whom as such she is subordinate. But she is at the same time his companion, the partner and sharer of his fortune, in many respects his equal; who in her appropriate sphere is entitled to share largely in his authority. And he is bound not only to honor and support her, but to accord to her freely and liberally all her rights, and to guarantee to her the full and free enjoyment of all her just privileges and prerogatives as the mistress of the family. In a particular manner he is bound to leave her free to enjoy her own religious opinions, and worship God according to the dictates of her own reason and conscience." Poor v. Poor, 8 N. H. 307, 315.

The tendency stated in the text is clearly shown in decisions holding that the wife may refuse to go to the husband's home, if it is with or near his relatives, and she has found it impossible to live with them in peace or happiness. **Brewer v. Brewer, 79 Neb. 726, 13 L. R. A. (N. S.) 222;** Powell v. Powell, 29 Vt. 148; Albee v. Albee, 141 Ill. 550; Shinn v. Shinn, 51 N. J. Eq. 78; Marshak v. Marshak, 115 Ark. 51, Ann. Cas. 1916 E 206; Fraser v. Fraser, 87 N. J. Eq. 633, L. R. A. 1917 F 738; Hall v. Hall, 69 W. Va. 175, 34 L. R. A. (N. S.) 758. And see Thompson v. Thompson, 205 Mich. 124, 3 A. L. R. 990 and note, in which compelling a wife to live with a mother-in-law who constantly abused and insulted her was held to be cruelty justifying divorce.

18—Com. v. Barry, 115 Mass. 146; Com. v. Kennedy, 119 Mass. 211; Com. v. Carroll, 124 Mass. 30.

19—Com. v. Wood, 97 Mass. 225.

20—Com. v. Wood, 97 Mass. 225; Com. v. Carroll, 124 Mass. 30.

He has not such control of her person as to make his consent necessary to the performance of a surgical operation upon her, if she is mentally competent, and consents to the operation.[21]

Blackstone discusses the right of the husband to chastise his wife, as follows: "The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children, for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet* (otherwise than lawfully and reasonably belongs to the husband for the due government and correction of his wife). The civil law gave the husband the same or a larger authority over his wife; allowing him for some misdemeanors, *flagellis et fustibus acriter verberare uxorem* (to beat his wife severely with scourges and sticks), for others only *modicam castigationem adhibere* (to use moderate chastisement). But with us, in the politer reign of Charles II, this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or in return a husband against his wife. Yet the lower rank of people, *who were always fond of the old common law*, still claim and exert their ancient privilege; and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior."[22]

21—Com. v. Hill, 145 Mass. 305.

22—1 Black. Com. 444. The suggestion that "the lower rank of people" beat their wives out of fondness for the common law, is an entertaining bit of humor, whether intentional or unintentional. See Adams v. Adams, 100 Mass. 365, 370, 1 Am. Rep. 111.

It is said to have been the traditional Old Bailey law that a husband might beat his wife with a stick no thicker than his thumb. But the later English cases deny to the husband any right to chastise the wife,[23] and the right of the husband to corporally punish the wife has been denied by the American courts with almost complete unanimity.[24] A

23—"Such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authority in a court of justice in this or any civilized country." Lord Ch. Halsbury, in Regina v. Jackson (1891) 1 Q. B. 671. The ruling in the case was that the husband had no right to confine the wife in order to force her to return to his house.

"If a woman gets drunk and loses her self-possession, and makes use of personal violence toward her husband, or destroys his property, he may use some force or violence if he cannot otherwise restrain her. If she comes drunk into his shop, he may take her by the shoulders and turn her out, but to follow after her and beat her is inexcusable; there is now no law authorizing a man to beat his drunken wife." Pearman v. Pearman, 1 Swab. & Tr. 601.

24—State v. Oliver, 70 N. C. 60; Fulgham v. State, 46 Ala. 143.

"There has been for many years a gradual evolution of the law going on for the amelioration of the married woman's condition, until it is now undoubtedly the law of England and of all the American states, that the husband has no right to strike his wife to punish her, under any circumstances or provocation whatever." Abbott v. Abbott, 67 Me. 307.

"Whatever may be the common law on the subject, the moral sense of this community, in our present state of civilization, will not permit the husband to inflict personal chastisement on his wife, even for the greatest outrage." Perry v. Perry, 2 Paige Ch. (N. Y.) 503. See also Brown v. Brown, 88 Conn. 42, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915 D 70.

Several early cases in North Carolina follow the ancient doctrine of Blackstone (see State v. Rhodes, Phillips Law (N. C.) 453, 98 Am. Dec. 78); but they are overruled in effect by State v. Oliver, *supra*. So, also, the Mississippi Supreme Court recognized the husband's right to moderately chastise his wife in Bradley v. State, Walker (Miss.) 156 (1824); but repudiated it in Harris v. State, 71 Miss. 462 (1893).

Com. v. McAfee, 108 Mass. 458, 11 Am. Rep. 383, holds that the husband has no right to strike the wife though she is drunk and insolent, and that if a blow under

similar change has occurred in the view of the English courts as to the right of a husband to imprison or restrain his wife to protect his marital rights, and prevent her misbehavior; in certain early cases such a right was recognized and enforced,[25] but later it is denied.[26]

Doubtless the husband would have the right to use force to restrain the wife from committing a violent or a criminal wrong;[27] but that depends rather on the right of every

such circumstances results in her death, he is guilty of manslaughter.

Gorman v. State, 42 Tex. 221, seems to hold that the husband might chastise his wife "to prevent her unwarrantable interference with the exercise and discharge of his parental authority and duty," to wit, in punishing a child.

25—Rex v. Lister, 1 Stra. 478 (1722); Re Cochrane, 8 Down. 630 (1840); Re Price, 2 Foster and Finl. 263 (1860).

"There can be no doubt of the general dominion which the law of England attributes to the husband over the wife; in Bac. Abr., tit. Baron and Feme (B), it is stated thus: 'The husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner.'" 8 Down. 633.

26—**Bailey v. People, 54 Col. 337, 45 L. R. A. (N. S.) 145, Ann. Cas. 1914 C 1142.**

"I do not mean to lay it down as the law that there may not be some acts, acts of proximate approach to some misconduct, which might give the husband some right of physical interference with the wife's freedom—for instance, if the wife were on the staircase about to join some person with whom she intended to elope, I could understand that there ought to be to some extent a right to restrain the wife. * * * The return seems to be based on the broad proposition that it is the right of the husband, where his wife has wilfully absented herself from him, to seize the person of his wife by force and detain her in his house until she shall be willing to restore to him his conjugal rights. I am not prepared to assent to such a proposition." Lord Ch. Halsbury in Regina v. Jackson (1891) 1 Q. B. 671.

See also State v. Weathers, 98 N. C. 687.

27—State v. Craton, 6 Ired. L. (N. C.) 164, often cited as supporting the old English doctrine of the husband's right of compulsion, comes fully within the exception suggested by Lord Halsbury in the succeeding note; the case being one where the wife was insisting defiantly on going with her paramour under circumstances of the greatest suspicion.

one to use reasonable efforts to prevent violence and crime, than on any peculiar power of the husband over the wife; and it would also justify like restraint of the husband by the wife.

§ 57. The rights and duties of the wife. The rights and duties of the wife are of course correlative to the duties and rights of the husband. The chief personal right of the wife, except the right to kind treatment, which for legal purposes amounts to little more than the negative right not to be abused, is the right of support. That will be more fully treated hereafter.

It is the duty of the wife to assist in the maintenance of the family by such reasonable labor as the necessities of the family and their circumstances in life and financial position require; while the husband has no right to require her to do more than this—to care for the house and the family as custom makes proper—and can not compel her to engage in business, to work for wages, nor to work for him in his business. But the rule is inflexibly maintained that any services of any kind, which either may render to the other or for the family, are rendered in consideration of the marriage relation, and of the mutual benefits received therefrom, and no right of action of one against the other for such services, or contract by one to pay the other therefor, will be sustained; though the husband may have promised to pay the wife a salary for unusual services, as in the fields or in his factory, or in the care of his feeble mother, this will be treated as purely voluntary, a promise to make her a gift, and no contract rights can be based upon it.[28]

28—**Blaechinska v. Howard Mission, 130 N. Y. 497, 15 L. R. A. 213;** Coleman v. Burr, 93 N. Y. 17, 45 Am. Rep. 160; Whitaker v. Whitaker, 52 N. Y. 371, 11 Am. Rep. 711; Re Callister's Estate, 153 N. Y. 294, 60 Am. St. Rep. 620; Citizens' St. Ry. Co. v. Twiname, 121 Ind. 375, 7 L. R. A. 352; Grant v. Green, 41 Iowa 88; Cramer v. Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594; Michigan Trust Co. v. Chapin, 106 Mich. 384, 58 A. S. R. 490 and note. *Contra*, where

§ 58. Lack of legal remedy to enforce conjugal rights. The personal rights existing between husband and wife are peculiar in that, while they are recognized and often defined by the courts, there are no direct legal remedies for their enforcement. In England there was from early times an action for the restitution of conjugal rights, by actual seizure and confinement of the person of the delinquent spouse, whether husband or wife; but in 1884 this remedy was so altered that the only mode of enforcement of the decree of restitution of rights is by treating noncompliance therewith as an act of desertion, and granting a judicial separation therefor.[29] In the United States no such direct remedy for denial of marital rights has ever been recognized. Indeed, an eminent judge has said: "For a married woman to leave her husband without cause is

he was sheriff, and as such contracted with her to board the prisoners. Carse v. Reticker, 95 Iowa 25, 58 Am. St. Rep. 421.

Doubtless the modern statutes extending the rights of married women in many states confer on her the right of contract in such broad terms as to make valid a contract between her and her husband for payment for services rendered to him in his business. The Pennsylvania Supreme Court holds that, under the broad power of contract given to a married woman by the act of 1893, a wife may contract with her husband to render services as cook in his business, and claim the amount due her as a preferred claim against his other creditors. Nuding v. Urich, 169 Pa. St. 289.

So in other states, Cormick v. First Trust Co., 100 Neb. 669, L. R. A. 1917 D 265 and note.

But, in the absence of an agreement to the contrary, her services, either about household duties or assisting him in his business, belong to the husband, "and neither his wife nor her creditors can assert a right to them by an action at law or otherwise." Standen v. Penn. R. Co., 214 Pa. St. 189, 6 Ann. Cas. 409.

In Cooper v. Cooper, 147 Mass. 370, and in Payne's Appeal, 65 Conn. 397, 48 Am. St. Rep. 215, 33 L. R. A. 418, the same doctrine was applied to a woman who had lived with a man as his wife for several years in good faith, and then, learning that he had a former wife living, sought to recover for her household services. Her claim was denied.

29—The Matrimonial Causes Act of 1884.

30—Holmes, J., in Tasker v. Stanley, 153 Mass. 148, 10 L. R. A. 468.

not a great crime. It is legal if with his consent, and if against his will it is only illegal in the sense that if she keeps away from him three years, he may get a divorce."[30]

There are three ways in which the law gives redress for violation of conjugal rights: (a) by divorce, when the violation is extreme enough to come under the divorce laws of the domicil of the parties; (b) by permitting the injured party to use the violation of his or her rights by the other party as a defense. For instance, it is a defense to a prosecution of the husband for non-support that the wife has refused, without just cause, to live with the husband; and it is a defense to a divorce suit for separation from the husband by the wife that the desertion was justified by the cruelty, intemperance or non-support of the husband; (c) by criminal prosecution, as in the case of prosecution of the husband for non-support of the wife, or for beating her.[31]

B. As Against Third Parties.

§ 59. **The rights of the husband.** The rights of action by the husband against third parties for injuries to his marital rights are three: first, the action for criminal conversation; second, the action for alienation of the wife's affections, or enticement of her to leave the husband; these two causes of action, though closely related, are separate, and either may exist without the other; third, the action for loss of the services and conjugal society, technically called the *consortium*, of the wife, by reason of personal injuries inflicted upon her by the tortious act or default of the defendant.

§ 60. **The husband's action for criminal conversation.** The mere fact of adulterous intercourse by the defendant with the wife of the plaintiff constitutes a cause of action,

31.—As to the right of the wife to sue her husband for a tort to the person, generally denied, but recently recognized by a few American courts, see *post*, § 99.

though she was not induced to leave him, and they continued afterward to live together,[32] and although she were already living apart from him, whether by his fault or hers.[33] It is no defense that she consented to the adultery,[34] nor that she refused consent, and the act was really a rape,[35] or that she was previously of lewd character,[36] or that the husband had been guilty of infidelity to her;[37] all such facts are admissible in mitigation of damages, as showing that the purity and value of the marital relation had already been destroyed or lessened; but if the marriage and the adultery are proven or admitted, there is no possible defense except the husband's consent.[38]

32—Stumm v. Hummel, 39 Iowa 478; Sikes v. Tippins, 85 Ga. 231; Verholf v. Van Houwenlegen, 21 Iowa 429; Clouser v. Clapper, 59 Ind. 548; Sanborn v. Neilson, 4 N. H. 501; Smith v. Meyers, 52 Neb. 70. In most of these cases the form of defendant's claim was that by subsequently living with the wife the plaintiff had condoned the offense; this claim was denied in all the cases.

See the note, Ann. Cas. 1918 A 647.

33—**Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307, Chase's Cases on Torts, 548;** Cross v. Grant, 62 N. H. 675, 13 Am. St. Rep. 607; Prettyman v. Williamson, 1 Penn. (Del.) 224; Browning v. Jones, 52 Ill. Ap. 597; Michael v. Dunkle, 84 Ind. 544, 43 Am. Rep. 100. *Contra,* Fry v. Derstler, 2 Yeates (Pa.) 278.

34—Bedan v. Turney, 99 Cal. 649; Seiber v. Pettitt, 200 Pa. St. 58; Wales v. Miner, 89 Ind. 118; Moore v. Hammons, 119 Ind. 510; Jacobsen v. Fiddal, 12 Ore. 280, 53 Am. Rep. 360; Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307.

See the note to 16 L. R. A. (N. S.) 742.

35—Egbert v. Greenwalt, 44 Mich. 245, 38 Am. Rep. 260; Hirdes v. Ottawa Circuit Judge, 180 Mich. 321, 52 L. R. A. (N. S.) 373 and note.

36—Clouser v. Clapper, 59 Ind. 548; Sanborn v. Neilson, 4 N. H. 501; Harrison v. Price, 22 Ind. 165; Conway v. Nicol, 34 Iowa 533.

37—Sanborn v. Neilson, 4 N. H. 501; Downing v. Jones, 52 Ill. Ap. 597; Rea v. Tucker, 51 Ill. 110, 99 Am. Dec. 539; Cross v. Grant, 62 N. H. 675, 13 Am. St. Rep. 607; Shattuck v. Hammond, 46 Vt. 466.

38—That the husband consented to or actively connived at his wife's adultery is manifestly a defense to an action against her paramour, since *volenti non fit injuria.* Milewski v. Kurtz, 77 N. J. L. 132; Prettyman v. Williamson, 1 Penn. (Del.) 224; Kahlhoss v. Mobley, 102 Md. 199, 5 Ann.

§ 61. The husband's action for alienation of the wife's affections. On the other hand, the action for alienating the wife's affections may be maintained when adultery is not charged against the defendant. Indeed, the wrongful acts of the defendant may be such as sprang not at all from lewd and adulterous motives, but rather from a disregard of the husband's rights, leading to an officious and unjustified interference with his marital happiness and welfare. The gist of the action is the loss of the *"consortium"*; that is, the conjugal society, affection and assistance of the wife.[39] The action is therefore often maintained against

Cas. 865; Lowe v. Massey, 62 Ill. 47; Cook v. Wood, 30 Ga. 891, 76 Am. Dec. 677; Schorn v. Berry, 63 Hun (N. Y.) 110; Bunnell v. Greathead, 49 Barb. (N. Y.) 106.

"Nothing would be a bar to an action for the tort except the plaintiff's consent thereto. This has long been the rule of the common law. Some authorities say, 'from time immemorial.'" Lewis v. Roby, 79 Vt. 487, 118 Am. St. Rep. 984. His suffering her to live as a prostitute constitutes sufficient proof of assent to the adultery with the defendant. Sanborn v. Neilson, 4 N. H. 401; Sherwood v. Pitman, 55 Pa. St. 77. But consent by the husband, after the criminal relations have become known to him, to his wife's remaining with the defendant and keeping house for him, is not a defense to an action for the past acts of adultery. Brown v. Spalding, 63 N. H. 622.

"But a husband may watch his wife whom he suspects, and may even leave open the opportunities which he finds, so long as he does not make new ones or invite the wrong. His mere negligence will not establish a defense." Puth v. Zimbleman, 99 Iowa 641; Lee v. Hammond, 114 Wis. 550. See also Wilson v. Wilson, 154 Mass. 194, 26 Am. St. Rep. 237, and other cases cited *ante*, § 46, note 26, in relation to connivance in divorce actions.

39—Heermance v. James, 47 Barb. (N. Y.) 120; Deitzman v. Mullin, 108 Ky. 610, 94 Am. St. Rep. 390, 50 L. R. A. 808; Gregg v. Gregg, 37 Ind. Ap. 210; Rudd v Rounds, 64 Vt. 432; Ireland v. Ward, 51 Oreg. 102.

"The measure of damages is the value of her services and marital *consortium*; that is, her conjugal society, affection and assistance, less the value of the husband's duty to support, clothe, cherish and care for her." Prettyman v. Williamson, 1 Penn. (Del.) 224.

"The jury may take into consideration the injury sustained by him in the loss of the comfort, society and service of his wife, and the wrong and injury done to his

parents or other relatives of the wife, by whose advice, persuasion and assistance, she is induced to leave the husband, or at least the peace and harmony of their relations is so destroyed as to do substantial injury to the husband. Of course if the wife's affections were alienated by an adulterer, and he persuaded her to leave the husband, both grounds of action would exist, and each would aggravate the other.

The cases are not in entire harmony as to the elements necessary to make up this cause of action. In the great majority of cases the mere destruction or impairment of the wife's affections from her husband is held to give a cause of action, without either the fact of adultery, or that the wife has left the husband.[40] In Massachusetts, however, it is held that the mere impairment of her affection for him is insufficient; and that either adultery, or an actual persuading of her to leave him, is essential to the cause of action.[41]

In cases resting on the officious interference of the de-

own feelings, character and condition." Hartpence v. Rogers, 143 Mo. 635.

40—**Rinehart v. Bills, 82 Mo. 534, 52 Am. Rep. 385**; Gregg v. Gregg, 37 Ind. Ap. 210; Adams v. Main, 3 Ind. Ap. 232, 50 Am. St. Rep. 266; Collis v. Merrieweather, 98 Md. 361, 103 Am. St. Rep. 404; Higham v. Vanosdol, 101 Ind. 160.

"The alienation of the wife's affections, for which the law gives redress, may be accomplished notwithstanding her continued residence under her husband's roof. Indeed it has been not unfrequently remarked by authors and jurists that such continued residence after the alienation has been effected, so far from leaving the husband without a good cause of action, contributes an aggravation to his injury, from which an elopement might well be accepted in the nature of an alleviation." Rinehart v. Bills, *ut supra*.

It is not necessary to show that the defendant completely alienated the wife's affections from the husband, and centered them in himself. "As to the claim that there is no such thing as a partial alienation of affection, it is enough to say that experience and observation show the fact to be far otherwise." Fratani v. Coslani, 66 Vt. 275, 44 Am. St. Rep. 843.

41—**Houghton v. Rice, 174 Mass. 366, 75 Am. St. Rep. 351, 47 L. R. A. 310.**

fendant with the marital relation, rather than on a claim of seduction, attempted or accomplished, the motive of the defendant becomes a matter of importance. Thus for parents to consult with their married daughter in good faith, to protect her from the husband's abuse, even to advise her to leave him and to come home to them, is not actionable, if such interference was in good faith and was reasonably justified by the circumstances as they appeared to the parents.[42] Other relatives of the wife might claim the same

42—**Kleist v. Breiting, 146 C. C. A. 513, 232 Fed. 555, Ann. Cas. 1917 E 1014 and note;** Multer v. Knibbs, 193 Mass. 556, 9 L. R. A. (N. S.) 322 and note, 9 Ann. Cas. 958; Oakman v. Belden, 94 Me. 280, 80 Am. St. Rep. 396; White v. Ross, 47 Mich. 172.

Hutcheson v. Peck, 5 Johns. (N. Y.) 196 is the leading case. Other cases supporting the statement in the text are Burnett v. Burkhead, 21 Ark. 77, 76 Am. Dec. 358; Eagon v. Eagon, 60 Kan. 697; Lockwood v. Lockwood, 67 Minn. 476; Glass v. Bennett, 89 Tenn. 478; Brown v. Brown, 124 N. C. 19, 70 Am. St. Rep. 574; Tucker v. Tucker, 74 Miss. 93 L. R. A. 623; Rice v. Rice, 104 Mich. 371; Zimmerman v. Whitely, 134 Mich. 39; Beisel v. Gerlach, 221 Pa. St. 232, 18 L. R. A. (N. S.) 516; Gross v. Gross, 70 W. Va. 317, 39 L. R. A. (N. S.) 261.

"A husband may be false to his marital obligations, he may be immoral and indecent, he may be grossly cruel and abusive, he may become a confirmed drunkard, his conduct towards her may be such as to endanger her health, and entirely destroy her peace and comfort, so that she may properly leave him. In such case, to whom shall she apply, if not to her parents? And from whom shall she seek advice, if not from her parents? * * * A parent may not with hostile, wicked, or malicious intent, break up the relations between his daughter and her husband. He may not do this simply because he is displeased with the marriage, or because it was against his will, or because he wishes the marriage relation to continue no longer. But a parent may advise his daughter, in good faith and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him. * * * Whether the motive was proper or improper is always to be considered. Whether the persuasion or the argument is proper and reasonable, under the conditions presented to the parent's mind, is also always to be considered. It may turn out that the parent acted upon mistaken premises, or up-

right, though no doubt a clearer case of justification and good faith would be required to justify other relatives in interference than to justify a parent.[43] Even strangers, in an extreme case, might be justified in assisting the wife to leave her husband, and harboring her; but such action should never be volunteered, and would only be justified by a clear necessity of their intervention to protect her.[44]

Malice is an essential element of this cause of action in every case not involving seduction or adultery; but malice may be inferred from the fact of officious interference by a stranger, while good faith would be presumed in favor of near relatives.[45]

The action lies only for an active and intentional interference with plaintiff's marital status, and not for mere negligence; consequently a husband who employed detectives to watch his wife, who followed a different woman by mistake and thereby made a false report of the wife's misconduct, which fact caused the wife to leave her hus-

on false information, or his advice and his interference may have been unfortunate; still, we repeat, if he acts in good faith, for the daughter's good, upon reasonable grounds or belief, he is not liable to the husband." Oakman v. Belden, *supra*.

43—Powell v. Benthal, 136 N. C. 145; Ratcliffe v. Warner, 117 Va. 569, Ann. Cas. 1917 E 1022 and note.

44—**Tasker v. Stanley, 153 Mass. 148, 10 L. R. A.** 468; Higham v. Vanosdol, 101 Ind. 160; Geromini v. Brunelli, 214 Mass. 492, 46 L. R. A. (N. S.) 465 and note.

"A wife has the unquestioned right to seek and accept the advice and protection of a relative or stranger from the intolerable abuse and wrongs of her husband. And such relative or stranger so affording such protection or advice to the wife is not answerable to the husband for such conduct, if he acts in good faith and from motives of kindness and humanity. No one unasked, especially a stranger, has the right to volunteer his advice or protection, and if he does so he is amenable. 'It is one thing to actively promote domestic discord, but quite another to harbor from motives of kindness and humanity, one who seeks shelter from the oppression of her own lawful husband.'" Modisett v. McPike, 74 Mo. 647; followed in Hartpence v. Rogers, 143 Mo. 632.

45—Note to 46 L. R. A. (N. S.) 466.

band, can not recover damages for the alienation.[46]

§ 62. **The husband's action for loss of the consortium by personal injuries to the wife.** Besides these actions for injuries committed primarily against the marital rights of the husband, the law recognized in him a property right in the services, domestic activities and companionship of the wife, an injury to which gave him a cause of action against the wrongdoer, although the wrong was primarily done to the wife herself. If therefore she was injured by a battery or other act of violence, or if by the actionable negligence of some person she received a personal injury, in addition to the right of action for the direct injuries done to her, which must be pursued in a suit brought by the husband and wife jointly, the husband could maintain a separate action for the loss of her services and conjugal society. The primary idea involved was undoubtedly the loss to the husband of the valuable services of the wife, which constituted a property right in him; but the value of her companionship and the general benefits of her conjugal society, sentimental as well as practical, were also a substantial part of the conception of the *consortium*.[47]

46—Lilligren v. Burns Detective Agency, 135 Minn. 60, L. R. A. 1917 B 679.

47—3 Bl. Com. 140.

The elements entering into the common law conception of the *consortium* have been interestingly and learnedly discussed in Marri v. Stamford St. R. Co., 84 Conn. 9, Ann. Cas. 1912 B 1120, 33 L. R. A. (N. S.) 1042. A part of the opinion in that case is added. "The right of *consortium* was by no means fully expressed in the terms of society, companionship and conjugal affection. The right to service was a prominent factor in it, and in respect to certain kinds of injuries, without doubt, the predominant factor. If we go back to the times when it took on its meaning, the conditions were that the wife was socially and legally regarded as the husband's inferior, as having her existence merged into that of her husband, and as owing to him the duty, which he was entitled to command, of serving and ministering to him in all the relations of domestic life. Her emancipation of recent years was centuries in the future. She was looked upon as the servant of and minis-

With this was combined the right of the husband to recover for the costs of medical or surgical treatment made necessary by the wife's injuries. So that redress for violent or negligent injuries to a married woman could ordinarily be obtained only by two suits; one brought by husband and wife jointly for the direct injury done to her, and the other by the husband alone for the loss of the *consortium* and for the expense of cure.[48]

And if the injury to the wife resulted in her death, although there was no statute authorizing suit for damages for her death,[49] the husband has been allowed to recover for loss of the *consortium* between the time of the injury and of her death.[50]

It is evident that this theory of the pecuniary right of the husband in the services and companionship of his wife was based on an idea of the husband's superiority of right, and of the wife's quasi-servitude to him. The question has recently arisen whether such right of action continues to the husband in the states where the wife has become practically independent and equal to him in rights. When this question first arose, the courts commonly held that the husband's right of action was not affected by the general

trant to her liege lord, to whom and to whose interests she was, by virtue of her marriage vow, devoted. He was entitled to her services, and these she was expected to render in the care of his home, in the rearing of his children, and in attending upon his wants. The solace and comfort which she was expected to bestow were in part at least those which would naturally flow from her rendition of this service, and her society, companionship and affection as a faithful and loving wife would naturally have their fruition in a faithful performance of it.

The services which the law had in contemplation were not so much those which resulted in wages earned, or from the mere performance of labor, as those which found their expression at the domestic fireside, and in all manner of aid, assistance and helpfulness in all the relations of domestic life."

48—See, *post*, § 89.

49—See, *post*, § 137.

50—Bailey v. Long, 172 N. C. 661, L. R. A. 1918 B 708.

change in the wife's status by the modern statutes;[51] but the courts of several states have recently given the subject a very thorough re-examination, and now hold that the wife's right of action for an injury done to her covers the entire amount of damages received from the injury in question, that the husband's right to her services and companionship is not an independent property right, the injury to which is to be treated as a separate cause of action, and that therefore the action of a husband for the loss of the *consortium* resulting from injuries for which the wife has a right of action of her own no longer exists.[52] If, however, the husband has been in fact compelled to expend money for her cure, he doubtless still has an action therefor, even in those states.

§ 63. The corresponding rights of the wife. At common law the wife had no right of action corresponding to those of the husband discussed in the previous three sections. The views then prevalent as to the substantive law of the marriage relation made her so inferior a party that she was regarded as having no actionable right, either in the affection or in the chastity of her husband;[53] and the com-

51—Southern R. Co. v. Crowder, 135 Ala. 417; Hall v. Manson, 90 Iowa 585; Omaha R. Co. v. Challette, 41 Nebr. 578; Berger v. Jacobs, 21 Mich. 215. See also Kelley v. N. Y. N. H. & H. R. Co., 168 Mass. 308, 60 Am. St. Rep. 397, 38 L. R. A. 631, which is overruled in the Feneff case, cited in the next note.

52—**Marri v. Stamford St. R. Co., 84 Conn. 9, Ann. Cas. 1912 B 1120, 33 L. R. A. (N. S.) 1042;** Feneff v. N. Y. C. & H. R. Co., 203 Mass. 278, 133 Am. St. Rep. 291, 24 L. R. A. (N. S.) 1024; Bolger v. Boston El. R. Co., 205 Mass. 240; Blair v. Seitner Dry Goods Co., 184 Mich. 304, Ann. Cas. 1916 C 822, L. R. A. 1915 D 524 and note.

The New Hampshire court, in a well considered opinion, has declined to follow the Conn. and Mass. decisions. **Guevin v. Manchester St. R. Co., 78 N. H. 289, L. R. A. 1917 C 410.**

53—"In these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is

mon law of procedure would not tolerate the idea of a suit at law brought by a *feme covert* without the concurrence of her husband. The rule, too, that all her choses in action vested in him if enforced during the marriage, would have made the maintenance of such an action seem absurd.

Modern legislation, and still more the general change of public sentiment as to the relative rights of husband and wife, have made these views seem obsolete and abhorrent; and it has come to be generally held in the United States that the husband and wife are equal as to the right of each in the conjugal affection, society and chastity, of the other; and that the wife has the same right of action against another woman who commits adultery with her husband, or against any one who wrongfully alienates his affection, and induces him to leave her, that the husband has in the like case.[54] A few American courts still cling to the common

totally unregarded. One reason for which may be this; that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury." 3 Bl. Com. 142.

In Lynch v. Knight, 9 H. L. 589, the question was discussed whether a wife had a right of action for alienation of the affections of her husband at the modern English law; but the case did not present the question squarely, and no decision was rendered upon the point, the judges not agreeing in their opinion.

54—**Nolin v. Pearson, 191 Mass. 283, 114 Am. St. Rep. 605, 4 L. R. A. (N. S.) 643, 6 Ann. Cas. 658;** Foot v. Card, 58 Conn. 1, 18 Am. St. Rep. 258, 6 L. R. A. 829; Bennett v. Bennett, 116 N. Y. 584, 6 L. R. A. 553. These Connecticut and New York cases first overthrew the traditional doctrine; they were decided within a few months of each other, and each without reference to the other; the Conn. case in September, and the N. Y. case in December, 1889.

Other cases which support the doctrine of the text are Weber v. Weber, 113 Ark. 471, Ann. Cas. 1916 C 743 and note, L. R. A. (N. S.) 1915 A 67 and note; Haynes v. Newlin, 129 Ind. 581, 28 Am. St. Rep. 213, 14 L. R. A. 787, overruling Logan v. Logan, 77 Ind. 558; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Price v. Price, 91 Iowa 693, 51 Am. St. Rep. 360, 29 L. R. A. 150; Seaver v. Adams, 66 N. H. 142, 49 Am. St. Rep. 597; Betser v. Betser, 186 Ill. 537, 78 Am. St.

law distinction, and deny the right of action to the wife.[65]

Rep. 303; Gernerd v. Gernerd, 185 Pa. St. 233, 40 L. R. A. 549; Deitzman v. Mullin, 108 Ky. 610, 94 Am. St. Rep. 390; Brown v. Brown, 121 N. C. 8; Tucker v. Tucker, 74 Miss. 93, 32 L. R. A. 623; Rice v. Rice, 104 Mich. 371; Lockwood v. Lockwood, 67 Minn. 476; Hodgkinson v. Hodgkinson, 43 Neb. 269, 47 Am. St. Rep. 759, 37 L. R. A. 120; Wolf v. Frank, 92 Md. 138, 52 L. R. A. 102; Warren v. Warren, 89 Mich. 123, 14 L. R. A. 545; Humphrey v. Pope, 122 Cal. 253; Clow v. Chapman, 125 Mo. 101, 46 Am. St. Rep. 468, 26 L. R. A. 412; Beach v. Brown, 20 Wash. 266, 72 Am. St. Rep. 98, 43 L. R. A. 114; Sims v. Sims, 79 N. J. L. 577, 29 L. R. A. (N. S.) 842; Roth v. Goehring, 33 N. D. 413, Ann. Cas. 1918 A 643 and note, L. R. A. 1916 E 1086; Gross v. Gross, 70 W. Va. 317, 39 L. R. A. (N. S.) 261. In Work v. Campbell, 164 Cal. 343, 43 L. R. A. (N. S.) 581, a wife was held entitled to recover from one who had made false statements to her about her husband which induced her to leave him, and would have justified her in doing so if they had been true. Compare this case with Lilligren v. Burns, cited *ante*, note 46.

55—**Doe v. Roe, 82 Me. 503, 17 Am. St. Rep. 499, 8 L. R. A. 833:** Morgan v. Martin, 92 Me. 190; Duffies v. Duffies, 76 Wis. 374, 20 Am. St. Rep. 79, L. R. A. 420 (But the doctrine of this case is no longer the law of Wisconsin. By chapter 17 of the Laws of 1905 the right to sue for alienation of the husband's affection was expressly conferred upon the wife); Hodge v. Wetzler, 69 N. J. L. 490 (But see Sims v. Sims, 79 N. J. L. 577, 29 L. R. A. (N. S.) 842); Smith v. Smith, 98 Tenn. 101, 60 Am. St. Rep. 838; Lellis v. Lambert, 24 Ont. Ap. 653; Crocker v. Crocker, 98 Fed. 702, a federal decision by the U. S. Court in Massachusetts based on a belief as to the law of that state, which has been held erroneous in Nolin v. Pearson, *supra*.

A distinction might fairly be made between the right of the wife to maintain the action for criminal conversation, that is to say, for adultery alone, and that for alienation of the husband's affections; and it might reasonably be held that the mere fact of adulterous intercourse between the husband and the woman defendant did not make out a cause of action in favor of the wife, unless it was shown that the defendant was an active and willing party in the wrongful relations between herself and the plaintiff's husband—the seducer of the husband, so to speak; but most of the above cases affirm or deny the right to sue for criminal conversation or for alienation of affections, without distinction. The distinction above suggested seems to have been clearly drawn nowhere unless in Minnesota. It was held in Kroessin v. Keller, 60 Minn. 372, 51 Am. St. Rep. 533, 27 L. R. A. 685, that a married woman cannot maintain an action "simply in the nature of *crim. con.*" against another woman.

The common law never recognized any right of action in the wife for loss of the services and companionship of her

"There is and inevitably must be a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife and to abandon and desert her, and one in the nature of *crim. con.* We think the difference noticeable and material, although we do not wish to be understood as holding that the one first mentioned will lie." In the later case of Lockwood v. Lockwood, *supra*, the Minnesota court held that an action would lie for alienation of the husband's affections, without reference to Kroessin v. Keller. The distinction between the two causes of action is denied, and it is held that a wife can recover for either, in Turner v. Heavrin, 182 Ky. 65, 4 A. L. R. 562 and note. In Hart v. Knapp, 76 Conn. 135, 100 Am. St. Rep. 989, the defendant was a widow of full age, who after yielding to the seductions of the husband lived with him for some time in adultery at her house, leading to his abandonment of the plaintiff. The defendant complained of the following charge to the jury: "The defendant, if she committed adultery with the husband of the plaintiff, is liable for damages in the action, whether the husband sought and solicited the defendant, or the defendant the husband of the plaintiff:" but the court did not find the charge to be erroneous. The Supreme Court used the following language: "The gist of the defense set up in the requests is that the defendant did a great wrong by the persuasion of the husband. We know of no rule of law, civil or criminal, that absolves her from liability for such wrong because of such persuasion. In actions for criminal conversation at common law the fact that the wife was, so to speak, the seductress was of no avail as a defense. It may be that in cases like that of Kroessin v. Keller, 60 Minn. 372, an action by a married woman against one of her own sex simply for an act of adultery with the husband, and alleging neither alienation of his affections nor neglect or abandonment of the plaintiff, the fact that the husband was the seducer should be held to be a defense, as is suggested in that case; but we have no occasion here and now to decide such a question, for the case at bar is not at all like the Minnesota case."

Hart v. Knapp was approved and followed in Miller v. Pearce, 86 Vt. 322, 43 L. R. A. (N. S.) 332; but is criticized in Scott v. O'Brien, 33 Ky. L. 450, 16 L. R. A. (N. S.) 742, which holds that the fact that the plaintiff's husband was the active party in the seduction, rather than the wife, was admissible, but does not state clearly whether it is a complete defense or only a fact relevant as to the quantum of damages.

See also the note to this case in 16 L. R. A. (N. S.) 742.

husband analogous to his right of action for the loss of *consortium*.[56] In jurisdictions whereby the modern decisions the husband's action for loss of the *consortium* is no longer recognized, the husband and wife are therefore placed on a position of exact equality in this respect also.

56—2 Bl. Com. 142, quoted, *ante* note 53.

Feneff v. N. Y. C. & H. R. Co., 203 Mass. 278, 133 Am. St. Rep. 291, 24 L. R. A. (N. S.) 1024; Brown v. Kistleman, 177 Ind. 692, 40 L. R. A. (N. S.) 236; Nieberg v. Cohen, 88 Vt. 281, Ann. Cas. 1916 C 476, L. R. A. 1915 C 483. But see Flandermeyer v. Cooper, 85 Ohio St. 327, Ann. Cas. 1913 A 983, 40 L. R. A. (N. S.) 360 and note; and Moberg v. Scott, 38 S. D. 422, L. R. A. 1917 D 732, in which it is said that in the modern view of a wife's rights she has a legal interest in the "consortium" of her husband, and can therefore recover damages against one who sold morphine to her husband, in defiance of her protests, and knowing that he was likely to be injured by using it. In Smith v. Nicholas Building Co., 93 Ohio St. 101, Ann. Cas. 1918 D 206 and note, L. R. A. 1916 E 700 and note, it is held that a wife might recover for loss of the *consortium* by an intentional act, but not by mere negligence.

The cases are fully reviewed in Emerson v. Taylor, 133 Md. 192, 5 A. L. R. 1045 and note.

CHAPTER XI.

THE PROPERTY RIGHTS OF HUSBAND AND WIFE AT THE COMMON LAW.

§ 64. The necessity of an historical treatment. In studying any field of the law it may be necessary to examine its historical development, that the student may understand the present law by knowing the older rule out of which it grew, and appreciating thereby the meaning of the changes that have been made, as well as the peculiarities that may still remain. But in the law of husband and wife there is a peculiar necessity for an historical treatment. The great revolution that has everywhere taken place in the social and legal view of the marriage relation has occurred so recently that couples are still living who were married while the common law was unchanged, and transactions that occurred prior to the modern reform statutes are often under investigation by the courts. The necessity constantly arises, therefore, of investigating and applying an earlier state of the law from that found in the present statute books.

Besides, the course of legislation has proceeded very differently in the different states. In some hardly any trace of the common law system is left; in others, the law reformers have confined themselves to alterations in particular details, and have left certain topics untouched; thus in many of the states the common law estates of dower and curtesy remain unchanged. Everywhere the statutes rest on the common law as their basis, its phraseology is used and must be understood if one would understand the statutes, and in any case which the statutes do not cover, either expressly or by reasonable implication, the common law still applies.

§ 65. Rights vested under prior laws are not taken away by statutory changes. The reform statutes passed in many of the states apply in terms only to those to be thereafter married.[1] If their construction in that respect is doubtful, they should be construed as prospective only.[2] In such a case there exist two bodies of law: the older applying to those married before a certain date, and the later to after-married couples. If a series of successive reform acts have been passed, there may be as many successive strata of law, each applying to those married at a particular period.

But even where the statute purports to affect those already married, its operation may be limited by the doctrine of vested rights. If a husband by the existing law had acquired a title or interest in property of the wife, the constitutional provision against depriving any person of property without due process of law would prevent the devesting of his title by a subsequent statute. The right which a husband has by the marriage to take an interest in any property which the wife may thereafter acquire, being a mere expectation like that of a son to succeed to his father's property at death, is not regarded as a vested right within the above rule. Reform statutes may therefore, if their language so provides, apply to property which may thereafter vest in couples already married. But if property or an interest therein has already vested under existing laws, its status can not be affected by a subsequent statute.[3]

1—For instance, the comprehensive Connecticut Act of 1877 (Public Acts of 1877, Ch. 114, p. 211) begins with the words, "That in all marriages hereafter contracted," and in § 5 again declares: "The foregoing provisions shall apply only to marriages hereafter contracted."

2—Stephens v. Hicks, 156 N. C. 239, 36 L. R. A. (N. S.) 254, Ann. Cas. 1913 A 272.

3—**Gladney v. Sydnor, 172 Mo. 318, 95 Am. St. Rep. 517, 60 L. R. A. 880.** In some cases the husband's right to reduce to possession property or choses in action in which an interest has already accrued to the wife is treated as a vested right of the husband under this constitutional provision. Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160; Norris v. Beyea, 13 N. Y. 273; Re Recipro-

§ 66. The unity of husband and wife the basis of the common law. The common law of England was governed, in its view of the property rights of husband and wife, by the theory of the unity of person created by the marriage ceremony, which the law adopted from the scriptural and sacramental doctrine of the church. "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[4] It naturally followed that the husband, having merged into himself the personality of the wife, had the control of all of her property, and the beneficial title, at least during the continuance of the mar-

city Bank, 22 N. Y. 9; Dunn v. Sargent, 101 Mass. 336; Kidd v. Montague, 19 Ala. 619; Shaeffer v. Shepard, 54 Ala. 244; Sperry v. Haslam, 57 Ga. 412; Farrell v. Patterson, 43 Ill. 52; Dubois v. Jackson, 49 Ill. 49; Leete v. State Bank of St. Louis, 115 Mo. 184; Sutton v. Askew, 66 N. C. 172, 8 Am. Rep. 500; Morris v. Morris, 94 N. C. 613; Benbow v. Moore, 114 N. C. 263.

In other cases the courts, while not denying that vested rights of the husband were safe from injury by subsequent legislation, by a narrower use of the term "vested" confined the application of the doctrine to such titles as were completely matured in point of right, and completed by possession. Price v. Sessions, 3 How. (U. S.) 624; Rose v. Rose, 104 Ky. 48, 84 Am. St. Rep. 430, 41 L. R. A. 353; Clark v. McCreary, 12 Smedes & M. (Miss.) 347; Duncan v. Johnson, 23 Miss. 130; Hart v. Leete, 104 Mo. 315; Henry v. Dilley, 25 N. J. L. 302; Goodyear v. Bumbaugh, 13 Pa. St. 480; Mellinger v. Bausman, 45 Pa. St. 522.

See McNeer v. McNeer, 142 Ill. 388, 19 L. R. A. 256 and Jackson v. Jackson, 144 Ill. 274, 36 Am. St. Rep. 427, for a close distinction as to vested and unvested rights of the husband.

4—1 Bl. Com. 442; 2 *idem* 433. "The general policy of the law with regard to marriage makes the wife one with her husband, and disables her separately or without him to make any contract, or do any legal act to bind his interest or her own." Adams v. Kellogg, Kirby (Conn.) 195. Kirby is the oldest volume of American law reports, and the case quoted was decided in 1786.

But the doctrine of the "unity of person" of the husband and wife, and its support by Biblical authority, was never more strongly stated in the ancient law than in Freeman v. Belfer, 173 N. C. 581, L. R. A. 1917 E 886.

riage, that husband and wife, being but one person, could make no contracts with each other, nor enforce any pre-existing contracts, and that she, having lost her personal existence, could make no contract with any other person. So far does Blackstone carry the theory of the merger of the identity of husband and wife, that he declares that the rule forbidding husband and wife to testify for or against each other rests principally upon the maxims: "No one ought to be a witness in his own case," and "No one shall be compelled to testify against himself."[5]

§ 67. **The common law modified, first by equity, secondly by statute.** This system, resting on the subordination of the wife, her loss of legal existence, the merger of her rights in those of her husband, resting too on a theory of her incapacity to care for herself and her own property, which put her, in some respects, below the capacity of a minor, was found to be very repugnant to the eighteenth and nineteenth centuries' spirit of liberality, of equality of rights for all, of protection of the weak against the strong. Two great methods of reform successively operated to modify the common law: first, the doctrine of the equitable sole and separate estate of the wife, originated and developed in the courts of chancery; secondly, the statutory process of reform legislation. Up to the middle of the nineteenth century, the modification of the common law system was principally by the courts of equity; at about the middle of the nineteenth century the process of statutory change began. We shall therefore first consider the property rights and legal status of husband and wife at the common law; and in the following chapters treat of the modification of the common law system by the equitable doctrine of sole and separate estate, and then of the revolutionary changes effected by modern legislation.

5—1 Bl. Com. 444.

§ 68. **Of the right gained by the husband by the marriage in the wife's real estate.** The husband, by the common law, is entitled during the marriage to the use, rents and profits, of all the real estate of the wife. This right attaches to any freehold estate of the wife, whether in fee simple, fee tail, or for life. The estate of the husband is itself regarded as a freehold, since it has no certain determinate term, and may by possibility last during his life; but the fee remains in the wife, and if the marriage is terminated by the death of the husband his title ceases, and the right of possession and control is reunited to the fee in the surviving wife. So also, if the wife dies (no children of the marriage having been born), the husband's title terminates, and her heirs take the real estate.[6] The title of the husband is also terminated by a divorce, whether for his own fault or for that of the wife.[7]

The substantial title is regarded as being in the wife. "The wife is the real and substantial owner," and the husband's interest is "a mere incidental right growing out of the coverture."[8] The husband can convey his interest by deed,[9] or lease,[10] or it can be taken on execution by his creditors;[11] but the title obtained from him by any of these

6—2 Bl. Com. 433; Reeve on Dom. Rel. 27; **Burleigh v. Coffin, 22 N. H. 118, 53 Am. Dec. 236;** Griswold v. Penniman, 2 Conn. 565; Clapp v. Stoughton, 10 Pick. (Mass.) 463, 469; Babb v. Perley, 1 Me. 6; Junction Railway Co. v. Harris, 9 Ind. 184, 68 Am. Dec. 618; Breeding v. Davis, 77 Va. 639, 46 Am. Rep. 740.

7—Starr v. Pease, 8 Conn. 541; Barber v. Root, 10 Mass. 260; Wright v. Wright, 2 Md. 429, 453, 56 Am. Dec. 723, 730. See also the cases cited in note 12, *infra*,

8—Watson v. Watson, 10 Conn. 77. "The technical phraseology of the common law is 'that husband and wife are jointly seised in right of the wife.'" Nichols v. O'Neill, 10 N. J. Eq. 90.

9—Trask v. Patterson, 29 Me. 499; Miller v. Shackleford, 3 Dana (Ky.) 289.

10—Eaton v. Whitaker, 18 Conn. 222, 44 Am. Dec. 586; Gould v. Webster, 1 Tyler (Vt.) 409; Brown v. Lindsay, 2 Hill Ch. (S. C.) 542.

11—Starr v. Pease, 8 Conn. 541, 545; Plumb v. Sawyer, 21 Conn. 351; Litchfield v. Cudworth, 15 Pick (Mass.) 23; Mattocks v. Stearns, 9 Vt. 326; Doe v. Brown, 5 Blackf. (Ind.) 309; Cany v. Por-

means fails whenever the coverture ceases, whether by death or divorce.[12]

But if, during the marriage, a child is born alive of the marriage, and the child is one capable of inheriting the estate, the husband's estate becomes enlarged to an estate for his own life, regardless of whether the wife survives him or not. In that case the husband, after the birth of the child, and while both he and the wife are living, is called "tenant by the curtesy initiate;" and upon the wife's death, leaving him surviving, he is tenant by the curtesy. This is fully discussed hereafter.[13]

§ 69. In her personal property in possession. "As to chattels personal, or choses in possession, which the wife hath in her own right, as ready money, jewels, household goods and the like, the husband hath therein an immediate and absolute property devolved to him by the marriage not only potentially but in fact, which never can again revest in the wife or her representatives."[14] The marriage effects a complete and final gift of all the wife's personal property to the husband; if she dies, he continues to be the owner, and if he dies, it goes to his heirs. Of course, as it is his own absolute property, he can sell, expend or give it away at his pleasure. And this applies as well to property which came into the wife's ownership and possession after the marriage, as to that which she owned at the time of the marriage.[15]

ter, 12 Ohio 79; Nichols v. O'Neill, 10 N. J. Eq. 88.

12—Starr v. Pease, 8 Conn. 541; Wheeler v. Hotchkiss, 10 Conn. 225; Barber v. Root, 10 Mass. 260; Doe v. Brown, 5 Blackf. (Ind.) 309; Oldham v. Henderson, 5 Dana (Ky.) 454; Howey v. Goings, 13 Ill. 95, 54 Am. Dec. 427; Gould v. Webster, 1 Tyler (Vt.) 409.

13—*Post*, § 100.

14—2 Bl. Com. 435; Reeve on Dom. Rel. 1; **Griswold v. Penniman, 2 Conn. 564;** Ewingdale v. Riggs, 148 Ill. 403; Sullee v. Arnold, 32 Mo. 532, 82 Am. Dec. 144; Tilexan v. Wilson, 43 Me. 186; Burleigh v. Coffin, 22 N. H. 118, 53 Am. Dec. 236.

15—Morgan v. Thames Bank, 14 Conn. 99; Burleigh v. Coffin, 22

§ 70. The wife's paraphernalia. One sole exception exists to the completeness of the husband's title to the wife's personal property. Her paraphernalia, that is, her clothing, jewelry and personal ornaments suitable to her station, whether given to her by the husband or acquired by her from other sources, though during the marriage they are in theory the property of the husband, at his death pass to her by a title superior to that of his legatees or next of kin.[16]

§ 71. In her chattels real. In any chattels real of the wife, that is, any interest in real estate not in fee or for life, but for a term of years only, the husband acquires by the marriage the use and income during the marriage, together with the right at any time during the marriage to dispose of such chattel, in which case the proceeds will become his absolute property; and if the wife dies leaving a chattel real undisposed of, it then becomes the husband's absolutely; but if he dies leaving the chattel real undisposed of and the wife surviving him, the chattel real reverts to her. It results from his right to dispose of it, that it may be taken in execution for his debts; and from her right of survivorship, that he can not devise or bequeath it.[17]

§ 72. In her choses in action. The common law rule as to the husband's right in his wife's choses in action is similar to that affecting her chattels real; but it differs in

N. H. 118, 53 Am. Dec. 236; Ewing v. Helm, 2 Tenn. Ch. 386; Shirley v. Shirley, 9 Paige Ch. (N. Y.) 363. This is so, even if the personal property were the proceeds of a sale of the wife's land. Kesner v. Trigg, 98 U. S. 50.

16—2 Bl. Com. 435; **Rawson v. Penn. R. Co., 48 N. Y. 215, 8 Am. Rep. 543;** Howard v. Menifee, 5 Ark. 668; Tilexan v. Wilson, 43 Me. 186.

See Masson v. De Fries, (1909) 2 K. B. 831, 4 Brit Rul. Cas. 601.

And see *post*, § 110, note 63.

17—Co. Litt. 351 A.; 2 Bl. Com. 434; Reeve on Dom. Rel. 22; Griswold v. Penniman, 2 Conn. 564; Flannery v. Rohrmayer, 49 Conn. 27; Riley v. Riley, 19 N. J. Eq. 229; Allen v. Hooper, 50 Me. 371.

one important particular. As in the case of chattels real, the husband has the right to reduce her choses in action to his possession, when they become his sole property, and the wife loses all right and title to them; but if the wife dies while the choses are still unreduced to possession, they become assets of her estate, and the husband loses all right to them, differing in this respect from chattels real, which in the like case become the husband's.[18] Divorce has the like effect of terminating the husband's right to reduce the wife's choses to possession; and the title to unreduced choses therefore remains in the wife after divorce.[19]

The question sometimes arises, what act constitutes a "reduction to possession" of the wife's choses in action such as to vest the sole title in the husband. It is not necessary that the chose in action should be finally collected, that is, turned into cash. The rule may be thus stated: he must make such a change in the form of the chose in action as to place it in his own name and control. For instance, if he sues on a debt due the wife before marriage, the common law requires her name to be joined with his as plaintiff in the suit, and the judgment when recovered will be in their joint names; consequently, there is no reduction to the husband's possession. But when the judgment is paid,

18—2 Bl. Com. 434; Reeve on Dom. Rel. 3; Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160; McCaa v. Woolf, 42 Ala. 389; Birmingham Water Works v. Hume, 121 Ala. 168, 77 Am. St. Rep. 43; Parsons v. Parsons, 9 N. H. 309, 321, 32 Am. Dec. 362; Standerford v. Devol, 21 Ind. 404, 83 Am. Dec. 351; Robinson v. Woelpper, 1 Whart. (Pa.) 179, 29 Am. Dec. 44; Lodge v. Hamilton, 2 Watts & S. (Pa.) 491.

Some of the cases cited in this and the following notes speak of the husband as being entitled to the wife's choses in action in the event of his surviving her; but it would seem that where this right exists it is rather his statutory right of administering her estate for his own benefit, and in the nature of a right of inheritance, than his common law title as husband. See *post*, § 101.

19—Legg v. Legg, 8 Mass. 99; Arrington v. Arrington, 102 N. C. 491, 514. See Lodge v. Hamilton, 2 Watts & S. (Pa.) 491.

unless the husband places the proceeds in his wife's name and control, there is a complete reduction to his possession. But if, without collection, he should change the security into his own name, as if he should give up a note payable to the wife, and take in place of it one payable to himself, this would be a reduction to possession.[20] It is also a reduction to possession if the husband assign the chose in action to a third party, and receive a valuable consideration therefor.[21]

Choses in action, within the meaning of this section, include not only rights to sue for a debt, or for recovery of personal property, but also rights of action for a tort to

20—Hart v. Leete, 104 Mo. 315; Parsons v. Parsons, 9 N. H 309, 321, 32 Am. Dec. 362; Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85; Horner v. Webster, 33 N. J. L. 387.

The recovery of a judgment by the husband in his own name, or even the receipt of the money therefor, does not constitute a reduction to the husband's possession, if in obtaining and collecting the judgment he acted expressly as his wife's agent. There must be not only the act, but the intention to convert it to his own use. Pierson v. Smith, 9 Ohio St. 554, 75 Am. Dec. 486.

21—Tuttle v. Fowler, 22 Conn. 58; Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160; Birmingham Water Works v. Hume, 121 Ala. 168, 77 Am. St. Rep. 43; Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196, 207; Lowry v. Houston, 3 How. (Miss.) 394; Evans v. Secrest, 3 Ind. 545. An assignment made by him merely as collateral security for a pre-existing debt does not cut off the wife's right of survivorship. Hartman v. Dowdel, 1 Rawle (Pa.) 279. But *aliter*, where it was security for a present advance of money. Tritt v. Colwell, 31 Pa. St. 228. But if he assigns it to trustees for the benefit of the wife and her children, that will be a valid reduction of the chose to his possession, and will prevent a second husband from claiming the chose as still her property.

Re Siter, 4 Rawle (Pa.) 468, 26 Am. Dec. 115, contains a valuable discussion of the husband's power of assignment by Chief Justice Gibson. If the chose in action is contingent, or the time at which it is payable is postponed, the husband cannot, by assignment for consideration, give the assignee a better right than he himself had; therefore, if the husband should die before the time of payment arrived, the wife's right of survival would prevail over the assignee's title. **Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85,** which reviews carefully the English cases; Dunn v. Lancaster, 4 Bush (Ky.) 581, 96 Am. Dec. 317;

the person,[22] personal rights [23] or reputation,[24] of the wife. The interest in a corporation represented by its shares,[25] and the right to receive a legacy, or a share by inheritance, from the estate of a deceased person,[26] are also "choses in

Purdew v. Jackson, 1 Russ. 70; Horner v. Morton, 3 Russ. 65. *Contra*, Re Siter, 4 Rawle (Pa.) 468, 26 Am. Dec. 115; Webb's Ap., 21 Pa. St. 248.

22—Smith v. Smith, 98 Tenn. 101, 30 Am. St. Rep. 838; Chicago, B. & Q. R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606; Anderson v. Anderson, 11 Bush (Ky.) 327; Bergen v. Jacobs, 21 Mich. 215.

23—Thus in Bennett v. Bennett, 116 N. Y. 584, 6 L. R. A. 553, it was held that the wrong done to the wife by the alienation of the affections of her husband was in its nature a chose in action vested in her and which would survive to her in case of the husband's death; and that although an action could not be maintained thereon at the common law during the coverture, because of the necessity of joining her husband with her as co-plaintiff, and the impossibility of his maintaining a suit for a tort to which he was a party, the disability grew out of the law of procedure rather than out of the substantive law, and when the wife obtained the right to sue in her own name, she could sue for alienation. See also other cases *ante*, sec. 63, notes 54 and 55.

24—Anderson v. Anderson, 11 Bush (Ky.) 327.

25—"The rule of the common law was that choses in action, including shares of stock * * * continued to be her property after marriage until reduced to possession by her husband." Reciprocity Bank, 22 N. Y. 9, 15.

Birmingham Water Works v. Hume, 121 Ala. 168, 77 Am. St. Rep. 43; Slaymaker v. Bank of Gettysburg, 10 Pa. St. 373; Wells v. Tyler, 25 N. H. 340; Wilder v. Aldrich, 2 R. I. 518.

26—Parsons v. Parsons, 9 N. H. 309, 321, 32 Am. Dec. 362; Dunn v. Lancaster, 4 Bush (Ky.) 581, 96 Am. Dec. 317; Robinson v. Woelpper, 1 Whart. (Pa.) 179, 29 Am. Dec. 44; Tyler v. Hoyle, 5 Johns, Ch. (N. Y.) 196; Lowry v. Houston, 3 How. (Miss.) 384; Horner v. Webster, 33 N. J. L. 387; Curry v. Fulkinson, 14 Ohio 100; Probate Court v. Niles, 32 Vt. 775; Holbrook v. Waters, 19 Pick. (Mass.) 354; Wheeler v. Bowen, 20 Pick. (Mass.) 563; Howard v. Bryant, 9 Gray (Mass.) 239.

Com. v. Manley, 12 Pick. (Mass.) 173, and Albee v. Carpenter, 12 Cush. (Mass.) 382, seem to hold the contrary doctrine, that is, that a bequest or right of inheritance becomes the absolute property of the husband before collection, but these early Massachusetts cases are overruled by the later ones first cited. Griswold v. Penniman, 2 Conn. 564, distinguishes between a legacy or right of action against an estate and "a distributory share of chattels personal in possession," holding that the

action" within the above rule. Choses in action accruing to the wife during coverture, of which the most common instance is a legacy or inheritance, are within the same rule as those which accrued before the marriage.[27]

§ 73. In her earnings. Money due to the wife for her labor or other personal services rendered during the coverture is regarded in a somewhat different light from that due to her on other accounts. The labor and earning capacity of the wife is her husband's property rather than her own, and her earnings belong absolutely to the husband, even before reduction to his possession.[28] Any in-

latter interest is not a chose in action, but vested property, which passes absolutely to the husband. See the peculiarity of the Connecticut law on this subject in the next note.

27—Garforth v. Bradley, 2 Ves. 676; Richards v. Richards, 2 Barn. & Ald. 447, 22 E. C. L. 119; Gates v. Madeley, 6 Mees. & W. 423; Dalton v. Midland R. Co., 13 C. B. 474, 76 E. C. L. 474; Fleet v. Perrins, L. R. 3 Q. B. 536, L. R. 4 Q. B. 500; Hayward v. Hayward, 20 Pick. (Mass.) 517; Standeford v. Devol, 21 Ind. 404, 83 Am. Dec. 351; Bond v. Conway, 11 Md. 512; Wilder v. Aldrich, 2 R. I. 518; Lenderman v. Palley, 1 Houst. (Del.) 523. A line of Connecticut cases, beginning at an early time, following an erroneous statement in Reeve on Dom. Rel., 60, held that the husband became absolute owner of choses in action accruing to the wife after marriage, as of choses in possession. Griswold v. Penniman, 2 Conn. 564; Cornwall v. Hoyt, 7 Conn. 420; Beach v. Norton, 8 Conn. 77; Whittelsey v. MacMahon, 10 Conn. 137, 26 Am. Dec. 382; Morgan v. Thames Bank, 14 Conn. 99; Edwards v. Sheridan, 24 Conn. 165. "The principle which our courts have established on this subject is undoubtedly a departure from the common law, and ought not to be extended so as to operate unjustly." Fuller v. Naugatuck R. Co., 21 Conn. 557, 573.

28—**Standen v. Penn. R. Co., 214 Pa. St. 189, 6 Ann. Cas. 408;** Coleman v. Burr, 93 N. Y. 17, 45 Am. Rep. 160; Prescott v. Brown, 23 Me. 305, 39 Am. Dec. 623; Garretson v. Appleton, 58 N. J. L. 386; Jones v. Reid, 12 W. Va. 350, 29 Am. Rep. 455; McLemore v. Pinkston, 32 Ala. 266, 68 Am. Dec. 167; Schwarz v. Saunders, 46 Ill. 18; Hazelbaker v. Goodfellow, 64 Ill. 238; Skillman v. Skillman, 15 N. J. Eq. 478, 82 Am. Dec. 279; Hinman v. Parks, 33 Conn. 188. *Contra*, Peterson v. Mulford, 36 N. J. L. 481; Boozer v. Addison, 2 Rich. Eq. (S. C.) 273, 46 Am. Dec. 43.

vestment of her earnings, therefore, though made in her own name, belongs to the husband, and may be taken by his creditors.[29] The right of action for board and lodging furnished to a third person, or even for special services, such as nursing, is in the husband rather than in the wife, if they were furnished in the house which she and her husband occupied together, though she made the agreement and rendered the services.[30] But the equitable doctrine of the sole and separate property of the wife, which may arise, among other means, by gift from the husband,[31] and the recognition at law in modern times of the right of the husband to make gifts to his wife, subject to the right of creditors to overthrow any gift which is made fraudulently as against them,[32] often operate to secure the wife in equity

29—Seitz v. Mitchell, 94 U. S. 580; Bailey v. Gardner, 31 W. Va. 94, 15 Am. St. Rep. 847; Cramer v. Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594; Yopst v. Yopst, 51 Ind. 61; Carleton v. Rivers, 54 Ala. 467. In Russell v. Brooks, 7 Pick. (Mass.) 65, it was held that where a husband had left his wife and was living in adultery with another woman, but occasionally visted his wife, his administrator could recover from her money received by her in the course of business which she was carrying on, and personal property bought with such earnings: and in Washburn v. Hale, 10 Pick. (Mass.) 429, the husband's administrator was held bound to collect from the widow about seven dollars in specie, a part of which was her earnings, and a part a gift from the husband. These two decisions admirably illustrate the favoritism shown to the female sex by the common law, as celebrated in the famous passage from Blackstone (I Bl. Com. 445). Bailey v. Gardner, *supra*, is a case of equal hardship to the wife.

30—Stevenson v. Akarman, 83 N. J. L. 458, 46 L. R. A. (N. S.) 238 and note.

31—Jones v. Reid, 12 W. Va. 350, 29 Am. Rep. 455; Kee v. Vasser, 2 Ired. Eq. (N. C.) 553, 40 Am. Dec. 442. See note, 46 L. R. A. (N. S.) 240; and as to the wife's sole and separate estate, see *post*, § 113.

32—McNaught v. Anderson, 78 Ga. 499, 6 Am. St. Rep. 278; Peterson v. Mulford, 36 N. J. Law 481; Riley v. Mitchell, 36 Minn. 3; Yake v. Pugh, 13 Wash. 78, 52 Am. St. Rep. 17; Hinman v. Parks, 33 Conn. 188; Jones v. Reid, 12 W. Va. 350, 29 Am. Rep. 455; McLemore v. Pinkston, 31 Ala. 266, 68 Am. Dec. 167; Hazelbaker v. Goodfellow, 64 Ill. 238; Skillman v. Skillman, 15 N. J. Eq. 478, 82 Am. Dec. 279; Carleton v. Rivers,

as to property which she has acquired by her own earnings with the consent of the husband.

§ 74. The wife's equity to a provision from her choses in action. Before the equity courts established a general system of protection of the rights of married women through the doctrine of her sole and separate estate, which will be discussed hereafter, they intervened in the wife's interest to prevent an unjust appropriation of her choses in action to the husband's use, or that of his creditors. This doctrine was first developed in the chancery courts of England.[33] In New York, under the energetic administration of equity powers by Chancellors Kent, Walworth, and their successors, the wife's equity became an important field of equity jurisprudence. Not only was the husband compelled to make a suitable provision for his wife and her children when he sought the aid of equity to enforce his title to her choses in action,[34] but the wife might herself become the petitioner, and set in motion the powers of equity for her security when the husband was reducing her choses in action to his possession by legal process, or without process;[35] and her equity prevailed against his assignee or creditor, as well as against himself.[36] This equity of the

54 Ala. 467; Bailey v. Gardner, 31 W. Va. 94, 15 Am. St. Rep. 847; Seitz v. Mitchell, 94 U. S. 580. See *post*, § 95.

33—Jewson v. Moulson, 2 Atk. 417 (1742); Milner v. Calmer, 2 P. Wms. 639 (1731); Elibank v. Montolieu, 5 Ves. Jr. 737 (1801).

34—Howard v. Moffatt, 2 Johns. Ch. (N. Y.) 206; Glen v. Fisher, 6 Johns. Ch. (N. Y.) 33; Fabre v. Colden, 1 Paige Ch. (N. Y.) 166; Re Stuart, 1 Edw. Ch. (N. Y.) 168.

35—Kenney v. Udall, 5 Johns. Ch. (N. Y.) 464, affirmed, 3 Cow. 590; Haviland v. Meyers, 6 Johns. Ch. (N. Y.) 25; Carter v. Carter, 1 Paige Ch. (N. Y.) 463; Van Epps v. Van Deusen, 4 Paige Ch. (N. Y.) 64; Dewall v. Covenhoven, 5 Paige Ch. (N. Y.) 581; Fry v. Fry, 7 Paige Ch. (N. Y.) 46; Martin v. Martin, Hoffman's Ch. (N. Y.) 462.

36—Kenney v. Udall, 5 Johns. Ch. (N. Y.) 646, aff., 3 Cow. 590; Haviland v. Myers, 6 Johns. Ch. (N. Y.) 25; Haviland v. Bloom, 6 Johns. Ch. (N. Y.) 178; Smith v. Kane, 2 Paige Ch. (N. Y.) 303; Van Epps v. Van Deusen, 4 Paige Ch. (N. Y.) 64. This right of

wife has also been recognized in Massachusetts,[37] and in other states of the Union.[38]

the wife is a sufficient consideration for a settlement upon her by the husband, as against his creditors. Partridge v. Havens, 10 Paige Ch. (N. Y.) 618; Wickes v. Clarke, 3 Edw. Ch. (N. Y.) 58.

"Where the husband has violated the marriage contract, or has been guilty of an act which entitles the wife to a decree for a divorce or for a separation, and for alimony, she is in equity entitled to a restoration of the property which the husband holds by virtue of his marital rights, and the court of chancery will protect her right not only against himself, but against judgment creditors and others who do not stand in the situation of *bona fide* purchasers without notice of her equitable rights and of her intention to enforce them. So where the wife is a ward in chancery, and the husband has put himself in contempt by marrying her without consent of the court or of her guardian, or where the husband is obliged to come into chancery to obtain possession, or, it would seem, whenever the husband has not reduced the property to entire possession, the court of chancery will protect the wife's equity. But where the husband has come into possession of the wife's property without fraud, and has not forfeited his right by any breach of the marriage contract, so as to entitle the wife to a separation, and judgment creditors have obtained a valid lien upon his interest by the curtesy, there is no rule of law or equity which will permit the wife to defeat the lien, though its enforcement leaves her and the children without support." Van Duzer v. Van Duzer, 6 Paige Ch. (N. Y.) 366.

37—"There is no doubt that in England such power not only exists, but is very frequently exercised. It there is not limited to property holden in trust, nor to cases where chancery is appealed to for the purpose of lending its aid to enable the party to enforce payment. But in all cases of choses in action belonging to the wife, whether they were hers before coverture or accrued afterward, and of legacies and bequests, where husband and wife attempt to recover them in other tribunals, chancery will interfere and compel the husband to make suitable provision for his wife or enjoin him against proceeding in his suits. The same practice prevails to some extent in New York, but is repudiated in other states. It would seem to be repugnant to what we deem the legal rights of the husband, and would never be carried so far here as it has been in England." Sawyer v. Baldwin, 20 Pick. (Mass.) 387. But the English and New York doctrine seems to be fully recognized and followed in Davis v. Newton, 6 Metc. (Mass.) 543.

38—Bell v. Bell, 1 Ga. 637; Salter v. Salter, 80 Ga. 178, 12 Am. St. Rep. 249; Elliott v. Waring,

§ 75. The liabilities cast upon the husband by the marriage. *A. For prenuptial liabilities of the wife.* Immediately upon the marriage the husband becomes liable for all existing debts or other liabilities of the wife; as he has received her personal property, so he incurs the burden of her debts. But his liability continues only during the marriage, and ceases with its termination; if the wife dies, though all her property may have passed to the husband by the marriage and still be his, he is no longer liable for the debts; and if he dies, though all the personal property of the wife may have passed to him and so to his estate, that estate is not liable for her unpaid debts, but her own liability revives.[39] The law on this subject will be seen to be closely analogous to that relating to her choses in action. The right of collecting such choses vests in the husband, but must be exercised during the marriage; so the duty of paying her liabilities rests upon him, but can be enforced

5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69; Duvall v. Farmers Bank, 4 Gill & J. (Md.) 287, 23 Am. Dec. 558; Holms v. Franciscus, 2 Bland (Md.) 544, 575, 20 Am. Dec. 402; Browning v. Headley, 2 Rob. (Va.) 340, 40 Am. Dec. 755; Barron v. Barron, 24 Vt. 375, 391; Rees v. Waters, 9 Watts (Pa.) 94.

39—Schouler on Dom. Rel., § 56; Reeve on Dom. Rel. 1; Kies v. Young, 64 Ark. 381, 62 Am. St. Rep. 198; Phillips v. Richardson, 4 J. J. Marsh, (Ky.) 212; Cannon v. Grantham, 45 Miss. 94; Cole v. Shurtleff, 41 Vt. 311, 98 Am. Dec. 587; Randolph v. Simpson, 7 N. J. L. 346; Allen v. McCullough, 2 Heisk (Tenn.) 174, 183, 5 Am. Rep. 27; Parker v. Steed, 1 Lea (Tenn.) 206; Alexander v. Morgan, 31 Ohio St. 546; Morrow v. Whitesides, 10 B. Mon. (Ky.) 411. See the comprehensive note, Ann. Cas. 1915 C 857.

The husband's liability was discharged by the wife's death, though during the marriage a suit had been instituted, and his property had been attached and was in the sheriff's hands at the time of the wife's death. Lamb v. Belden, 16 Ark. 539.

The liability of the husband was held not released by a divorce, where the statute contained a clause as follows: "subject, however, to the right of creditors who became such before the decree was pronounced." Allen v. McCullough, 2 Heisk (Tenn.) 174, 5 Am. Rep. 27. But see, as to the effect of a divorce, Wilson v. Wilson, 30 Ohio St. 365; Ferguson v. Collins, 8 Ark. 241.

only during the marriage. It is evident that a gross injustice was done, both to the wife and to her creditors, by the rules of law on this subject, in any case where the wife had had a considerable amount of personal property, and either her death or the husband's occurred soon after the marriage.[40]

The liability is regarded as one cast upon the husband by law, rather than one resting in contract. It follows that his infancy is no defense to the suit,[41] though her infancy may often be a defense by showing that the original contract on which her supposed liability is based was invalid.

§ 76. *B. For the torts of the wife.* As to any tort of the wife committed before the marriage, a right of action immediately existed against her therefor; and this right of action is a liability within the doctrine of the previous sec-

40—This is illustrated by the case of Hetrick v. Hetrick, 13 Ind. 44, where a woman who owned eight hundred dollars and owed five hundred dollars married and soon after died. It was held that, though the husband had received the eight hundred dollars, he could no longer be held liable for the five hundred dollars. The court said: "Nor did the fact that the husband received property by his wife alter the case; even the very property for the purchase of which the debt was contracted."

"If A should marry B, possessed of personal property to the amount of any sum, suppose it to be $10,000, and B is at the same time indebted one-half that sum, and should die before her creditors should collect their debts from the husband covert, the coverture is now at an end, and the husband is no longer liable to her creditors; and as the $10,000 was the only property that belonged to B, the creditors must lose their debts. So, if the husband had died at any time before the creditors had collected from him the debt due from the wife, the executors of the husband would not he liable; and although it is true that the wife remains liable after her husband's death to the former creditors as much as when she was a single woman, yet she might be utterly unable to pay them." Reeve on Dom. Rel. 1.

41—Roach v. Quick, 9 Wend. (N. Y.) 238; Cole v. Seeley, 25 Vt. 220, 60 Am. Dec. 258; Butler v. Breck, 7 Metc. (Mass.) 164, 39 Am. Dec. 768; Reeve on Dom. Rel. 234.

tion. The husband is liable therefor during the marriage only.[42]

But as to torts committed by the wife during the marriage relation, a peculiar doctrine grew up at the common law, which rested on the theory of her merger of legal personality in that of her husband and subjection to his will. This is perhaps the only point at which the subordination of the wife operated in her favor and to his disadvantage.

If the wife committed any tortious acts in the presence of the husband, and by his command, or even with his consent, her will was supposed to have been dominated by his; it was conclusively presumed that she acted under his compulsion; she was consequently wholly freed from liability, and he was liable alone.[43] So far did the theory of his domination go that, if the wife committed a tort in the husband's presence, though without any evidence that he commanded or consented to it, his command was presumed; this presumption, however, was rebuttable; it might be proved that in fact he did not consent to the tortious act.[44] But for a tort committed by her when she was absent from

42—Hawk v. Harman 5 Binn. (Pa.) 43; Hubble v. Fogartie, 3 Rich. L. (S. C.) 413, 45 Am. Dec. 775; Jillson v. Wilbur, 41 N. H. 106.

43—**Marshall v. Oakes, 51 Me. 308;** Kosminsky v. Goldberg, 44 Ark. 401; Cassin v. Delaney, 38 N. Y. 178; Wheeler & Wilson v. Heil, 115 Pa. St. 487, 2 Am. St. Rep. 583; Emmons v. Stevane, 73 N. J. L. 349; Flesh v. Lindsay, 115 Mo. 1, 37 Am. St. Rep. 374; Hildreth v. Camp, 41 N. J. L. 306. See also the comprehensive note, 92 Am. St. Rep. 164. Chancellor Kent in his Commentaries, Vol. 2, p. 149, says of the wife's torts: "If committed in his company, or by his order, he alone is liable;" but in holding that the wife is not liable if she acts in her husband's absence, but under his command or instigation, the distinguished author states the rule too strongly. Kosminsky v. Goldberg, 44 Ark. 401; Handy v. Foley, 121 Mass. 259, 23 Am. Rep. 270; McElroy v. Capron, 24 R. I. 561.

44—Marshal v. Oakes, 51 Me. 308; Edwards v. Wessinger, 65 S. C. 161, 95 Am. St. Rep. 789; Brazil v. Moran, 8 Minn. 236, 83 Am. Dec. 772.

him, or if in his presence acting without his co-operation or consent, husband and wife were jointly liable, and must be jointly sued.[45]

Thus the husband was liable, either solely or jointly with the wife, for all torts of the wife; and she was never solely liable. But if the wife was an active and guilty participant in the wrong, her individual liability was only suspended or merged during the marriage; upon her husband's death she might be sued alone, or a pending suit against them jointly might be prosecuted to judgment against her alone.[46]

In imputing to a married woman liability for a tort, the same cautionary rule exists as in the case of an infant's tort;[47] since the married woman is not liable for breach of a contract, care must be exercised to see that her liability for tort is not so extended as to virtually enforce contract obligations. The cause of action must be "a tort simpliciter," and not one the essence of which is a breach of contract. To disregard this limitation would be to enforce a contract under guise of holding her liable for a tort.[48]

45—**Franklin's Appeal, 115 Pa. St. 534, 2 Am. St. Rep. 583;** Handy v. Foley, 121 Mass. 259, 23 Am. Rep. 270; Heckle v. Lurvey, 101 Mass. 344, 3 Am. Rep. 366; McElroy v. Capron, 24 R. I. 561; Radke v. Schlundt, 30 Ind. Ap. 213; Smith v. Taylor, 11 Ga. 20; Gill v. State, 39 W. Va. 479, 45 Am. St. Rep. 928.

46—Baker v. Braslin, 16 R. I. 635, 6 L. R. A. 718; Smith v. Taylor, 11 Ga. 20; Gill v. State, 39 W. Va. 479, 45 Am. St. Rep. 928; Parker v. Stead, 1 Lea (Tenn.) 206.

47.—See *ante*, § 18.

48—Thus a married woman was held not liable for the negligence of her servant, since the liability really springs from her contract relation with the servant. **Ferguson v. Nielson, 17 R. I. 81, 33 Am. St. Rep. 855.** Nor in trover for refusal to return the goods which she had bought under a contract of conditional sale, and failed to pay for. Wolff v. Lozier, 68 N. J. L. 103. Nor for deceit because the covenants for title in her deed were untrue. Brunnell v. Carr, 76 Vt. 174; Prentiss v. Paisley, 25 Fla. 927, 7 L. R. A. 640; Curd v. Dodds, 6 Bush. (Ky.) 381. Nor for false statements as to the quality of a chattel. Owens v. Snodgrass, 6 Dana (Ky.) 229. Nor for her fraudulent representations that she was a widow, whereby she procured valuable property upon her bond and mortgage.

In many of the modern statutes by which the status and rights of a married woman have been so radically changed, she is made solely liable for her torts to the same extent that other persons *sui juris* are liable, and the husband's exceptional liability is abolished. Where the statute does not expressly deal with the question of liability for torts, some courts have held that the same change resulted by necessary implication from statutes giving her the full ownership and control of her property. Since, it is said, the husband's liability for her torts was a natural corollary to his control of her property, the former should cease with the latter, since "*cessante ratione, cessat ipsa lex.*"[49] In

Keen v. Hartman 48 Pa. St. 497, 88 Am. Dec. 472. Nor upon her fradulent representations that she was in need, whereby she procured articles on her husband's credit. Woodward v. Barnes, 46 Vt. 332, 14 Am. Rep. 626.

But in Wirt v. Dinan, 44 Mo. Ap. 583, the court declared that the exception stated in the text had been carried so far as to be destructive of the general rule of liability for her torts, and concluded that "The broadness of what we have termed the exception to the general rule of liability of the husband and wife for the deceit of the wife, when damages result, is subject to these qualifications; first, where the wife by false representations obtains property and retains it, if a recovery can be had without giving effect to the contract, in a joint action against her and her husband to recover the loss actually sustained by her tort, her disability of coverture cannot be successfully pleaded in bar of the action; and, second, that the disability cannot be invoked as a defense in those cases where the false representations which induced the making of the contract and not a part of it, though connected with it, are antecedent to it. With these qualifications the exception can stand without being repugnant to the general rule of liability of the husband and wife."

49—**Hageman v. Vanderdoes, 15 Ariz. 312, L. R. A. 1915 A 491 and note, Ann. Cas. 1915 C 1197 and note;** Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578; Norris v. Corkill, 32 Kan. 409, 49 Am. Rep. 489. "The ancient landmarks are gone. The foundations hitherto deemed so essential for the preservation of the nuptial contract and the maintenance of the marriage relation are crumbling. The unity of husband and wife has been severed. His legal supremacy is gone and the scepter has departed from him. Her brain and hands and tongue are her own." Martin v. Robson, *supra.*

other cases the courts have refused to add by construction a new section to the reform act passed by the legislature, and have held that the precise reasons on which the common law rule rested were too obscure to permit any certain inference to be drawn as to its abolition.[50] And in a third group of decisions the husband is still held liable for the personal torts of the wife, since these are not directly affected by legislation conferring independent property rights upon her; but he is no longer liable for torts committed by her in the management of her separate property, not directed nor participated in by him.[51]

§ 77. *C. For her acts as his agent.* It is the husband's duty to provide the food, clothing, and other articles necessary for the support of the family; but in the usual arrangement of family life the wife is the husband's agent in such matters as belong to the management of the home; usually she purchases the food and other family supplies, employs the household servants, buys her own clothing and that of the children. The existence of such a general custom in society naturally leads the tradesmen supplying the family to assume that the husband will pay the bills contracted by the wife; and her authority as agent for him, as to such

50—**Henley v. Wilson, 137 Cal. 273, 58 L. R. A. 941, 92 Am. St. Rep. 160 and note;** Jackson v. Williams, 92 Ark. 486, 25 L. R. A. (N. S.) 840; Morgan v. Kennedy, 62 Minn. 348, 54 Am. St. Rep. 647, 30 L. R. A. 521; Fitzgerald v. Quann, 109 N. Y. 441; Tayler v. Pullen, 152 Mo. 434; Quick v. Miller, 103 Pa. St. 67; McElfresh v. Kukendall, 36 Iowa 228; Choen v. Porter, 66 Ind. 194; Ferguson v. Brooks, 67 Me. 251; Fowler v. Chichester, 26 Ohio St. 9; Kellar v. James, 63 W. Va. 139, 14 L. R. A. (N. S.) 1003 and note. But where the statute provides that "The wife may sue and be sued in all matters relating to her sole and separate property the same as if she were sole," she can be sued alone for fraud in the sale of her separate real estate, though the sale was made by her husband as her agent. Baum v. Mullen, 47 N. Y. 577.

51—Boutell v. Shellabarger, 264 Mo. 81, L. R. A. 1915 D 847; Quilty v. Battie, 135 N. Y. 201, 17 L. R. A. 251.

matters as are usually left to the wife to manage, will be presumed.[52] That presumptive agency is of course limited to such household affairs as are commonly left to the wife to manage; any authority to act for him in matters concerning his business must be shown by affirmative evidence.[53]

52—**Wanamaker v. Weaver, 176 N. Y. 75, 98 Am. St. Rep. 621 and note, 65 L. R. A. 529;** Phillipson v. Hayter, L. R. 6 C. P. 38; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Baker v. Carter, 83 Me. 132, 23 Am. St. Rep. 764; Flynn v. Messenger, 28 Minn. 208, 41 Am. Rep. 279; MacKinley v. McGregor, 3 Wharton (Pa.) 369, 31 Am. Dec. 522; Hughes v. Chadwick, 6 Ala. 651; Gilman v. Andrus, 28 Vt. 241, 67 Am. Dec. 713; Sauter v. Scrutchfield, 28 Mo. Ap. 150.

It is evident that the determining question in this class of cases is not whether the goods are necessaries; a husband may often expressly or by implication empower his wife to buy on his credit articles of a luxurious character, very far from the class of necessary supplies. If the wife's authority to make a particular purchase is challenged on the ground that the goods bought were extravagant and not within the proper scale of the family's expenditures, "the husband's responsibility does not stand on the question of necessity, but on the wife's agency. The necessity of the articles bought, the means of the parties, their condition in life, and the previous conduct of the husband with regard to the wife's purchases in his name, all enter into the inquiry as circumstances bearing on the measure of authority she has received or appears to have received from him." Johnson v. Briscoe, 104 Mo. Ap. 493.

"It is a reasonable presumption that both parties expect that she will conform to the habits and usages of the circle to which the husband introduces her, and where he expects her to find her intimate associates, and their habits of living and expenditure may fairly be taken as a standard by which to judge of those by the wife, where he has left her to make her own purchases." Clark v. Cox, 32 Mich. 204.

See also Sauter v. Scrutchfield, 28 Mo. Ap. 150, 157; Phillipson v. Hayter, L. R. 6 C. P. 38.

See the note as to the wife's agency for her husband, L. R. A. 1918 F 25-30.

53—"He is bound to fulfill the contract of his wife, when it is such a one as wives, according to the usage of the country, commonly make. If a wife should purchase at a merchant's store such articles as wives in her rank of life usually purchase, the husband ought to be bound; for it is a fair presumption that she was authorized so to do by her hus-

But even as to household bills, this agency is presumptive only. If the husband sees fit to order all supplies and contract all bills himself, it is his right to do so; and if he furnishes his wife the money necessary to supply the family, she has no right to pledge his credit.[54] The mere fact of the marriage, and that husband and wife are living together in the family relation, creates a *prima facie* presumption of her authority to purchase household supplies; but this presumption is a rebuttable one. The New York Court of Appeals has said in a recent case: "If a married woman goes to a merchant, and within reasonable limitations buys articles suitable for the family use and for her own wardrobe, the presumption is, in the absence of evidence to the contrary, that the husband is liable. But if it appears affirmatively that the lady is abundantly supplied with similar articles purchased elsewhere, and that there was not in fact any reasonable necessity for such expenditure, the husband can not be held responsible, unless there is some affirmative proof of actual authority outside of the authority the law infers from their marital relations."[55]

This implied agency may exist even if there were no valid marriage, or no marriage at all, between the apparent

band. If, however, she were to purchase a ship or yoke of oxen, no such presumption would arise, for wives do not usually purchase ships or oxen." Reeve on Dom. Rel. 79. Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Tuttle v. Hoag, 46 Mo. 38, 2 Am. Rep. 481.

54—Debenham v. Mellon, L. R. 6 Ap. Cas. 24; Morel v. Westmoreland (1904) A. C. 11; Clark v. Cox, 32 Mich. 204; Sauter v. Scrutchfield, 28 Mo. Ap. 150. So if the husband forbids his wife to purchase goods of a particular merchant, and notifies that merchant thereof, she has no longer an implied agency to buy of him; the husband's liability, if any, must be based on his neglect to support her at all. Hiblee v. Thomas, 99 Ill. Ap. 355.

55—Wanamaker v. Weaver, 176 N. Y. 75, 98 Am. St. Rep. 621, 65 L. R. A. 529. See also Clark v. Cox, 32 Mich. 204; Compton v. Bates, 10 Ill. App. 78; McCreery v. Watson, 84 N. J. L. 626, 47 L. R. A. 279 and note, Ann. Cas. 1915 A 1 and note.

spouses; it can hardly be deemed the duty of the tradesman who receives an order for household supplies from a woman apparently the wife of a man, with whom she is living as such, to require her to exhibit her marriage certificate before furnishing her supplies on his credit.[56]

If the wife is living apart from her husband, her apparent and presumptive authority to procure goods as his agent ceases.[57] But the ordinary principles of agency apply to the implied agency of the wife for her husband. If she had formerly been given authority as his agent, or if the husband by paying bills contracted by her had ratified her previous acts of agency, and such authority has been withdrawn, either by her separation from him, or by his supplying her with cash for the family requirements, he should notify the tradesmen who have been accustomed to supply her on his credit of the withdrawal of such credit; otherwise they will be able to hold him liable on the basis of the former agency, apparently still continuing.[58] This is the

56—Watson v. Threlkeld, 2 Esp. 687; Robinson v. Mahon, 1 Camp. 245; Munro v. DeChamant, 4 Camp. 215; Gomme v. Franklin, 1 Foster & F. 465; Blades v. Fell, 9 B. & C. 167; Redferus v. Inwood, 27 Ont. 213, Ann. Cas. 1913 D 1061 and note; Frank v. Carter, 219 N. Y. 35, L. R. A. 1917 B 1288 and note.

57—Vusler v. Cox, 53 N. J. L. 516; Raynes v. Bennett, 114 Mass. 424; Benjamin v. Dockham, 132 Mass. 181; Steinfield v. Girrard, 103 Me. 151; McCutchen v. McGahay, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; Constable v. Rosener, 82 App. Div. (N. Y.) 155, affirmed in 178 N. Y. 537; Bonney v. Perhan, 102 Ill. App. 634; Morgenroth v. Spencer, 124 Wis. 564; Revier v. Galloway, 71 Ill. 517; Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421; Rea v. Durkee, 25 Ill. 503; Stevens v. Story, 43 Vt. 327; Sturtevant v. Starin, 19 Wis. 268; Pool v. Everton, 50 N. C. 241; Cany v. Patton, 2 Ashm. (Pa.) 140.

The language of the opinion in Hatch v. Leonard, 165 N. Y. 435, seems to hold that the husband is presumptively liable for his wife's support though she is living away from him, and that it is for him to show facts which relieve him; see the criticism of this opinion in Constable v. Rosener, *supra*.

58—**Cowell v. Phillips, 17 R. I. 188, 11 L. R. A. 182;** Keller v. Phillips, 39 N. Y. 351; Sibley v. Gilmer, 124 N. C. 631; Snell v. Stone, 23 Ore. 327. It would be proper to notify not only those

reason of the "posting notices" often published in the newspapers after a marital separation.

Her agency may sometimes go beyond the mere purchase of necessaries; and she will have power to sell his property,[59] or to involve him in other obligations than for the direct purchase of necessary articles,[60] if by his failure to support her such acts of authority have become reasonably necessary for her to exercise in order to obtain support for herself and his family.

And it seems hardly necessary to add that, if the husband in fact confers authority upon his wife to act for him in a particular matter, or by his conduct gives her such apparent authority that the adverse party is reasonably led to trust him as principal, or if he ratifies her acts as his agent, he is liable on general principles of agency, though the matters may not have been within her special agency as his wife;[61] that is to say, he may confer upon her

who have hitherto dealt with her as the husband's agent, but any who are likely to do so, or the mercantile public generally, that they may not be misled by her claim of credit; but it is usually held that if one who has not had previous dealings with the wife as agent trusts the husband upon her orders, he takes the risk of her actual authority. Harttmann v. Tegart, 12 Kans. 177; Sturtevant v. Starin, 19 Wis. 268; Cany v. Patton, 2 Ashm. (Pa.) 140; Porter v. Babb, 25 Mo. 36; Reese v. Chilton, 26 Mo. 498.

59—**Ahern v. Easterby, 42 Conn. 546;** Rawson v. Spangler, 62 Iowa 59; Waugh v. Bridgeford, 69 Iowa 334. It is said in Evans v. Crawford Ins. Co., 130 Wisc. 189, 118 Am. St. Rep. 1009, 9 L. R. A. (N. S.) 485, that the implied authority of the wife has never been extended so as to empower her to sell his real estate.

60—Rotch v. Miles, 2 Conn. 638; Cheek v. Bellows, 17 Tex. 613, 67 Am. Dec. 686; Camerlin v. Palmer Co., 10 Allen (Mass.) 539; Filker v. Emerson, 16 Vt. 653, 42 Am. Dec. 532.

61—**Sibley v. Gilmer, 124 N. C. 631;** MacKinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; Shuman v. Steimel, 129 Wisc. 422, 116 Am. St. Rep. 961, 7 L. R. A. (N. S.) 1048, 9 Ann. Cas. 1064; Krieger v. Smith, 13 Mont. 235; Gray v. Otis, 11 Vt. 628; Gilman v. Andrus, 28 Vt. 241, 67 Am. Dec. 713; Conrad v. Abbott, 132 Mass. 330; Cox v. Hoffman, 4 Dev. & B. (N. C.) 180; Hardenbrook v. Harrison, 11 Col. 9.

Her agency in property matters

a particular agency, in matters wholly unconnected with the implied agency of the wife.

But whatever method the husband may adopt for furnishing necessaries for the support of his wife and family, whether by giving her the necessary funds, by procuring the needed supplies himself, or by making her his agent to procure them, he must furnish her such support, if she has not forfeited her right to support by her misconduct, and thus there arises the fourth and most important liability.

§ 78. *D. For her support.* The chief duty cast upon the husband by the law is that of supporting his wife; and this duty, unlike most of the others that have been discussed, is totally unaffected (except to be strengthened) by modern legislation. Existing when the husband took title to all his wife's personal property and the control and income of all her real estate by the marriage, it is equally stringent at the present day, and in states where the wife retains all her property and is practically independent of the husband as to property rights. This liability, however, like other obligations existing between husband and wife, could not at the common law be directly enforced by a civil action; the wife, that is, could not sue her husband for her own support. But it has been held in many modern cases (though denied in others) that equity has power to order provision for a wife's support to be made by a delinquent husband, either by awarding her alimony, which has sometimes been done without the bringing of a divorce action, or by requiring an payment to her of a periodical sum for her support and that of her children;[62]

will be more readily implied when he is absent, and she is in possession of the property. Meyer v. Frankil, 116 Md. 411, Ann. Cas. 1913 C 875 and note.

As to the husband's liability by ratification for debts contracted by the wife, see notes to 7 L. R. A. (N. S.) 1048, and 9 Ann. Cas. 1067.

62—Lang v. Lang, 76 W. Va. 295, 38 L. R. A. (N. S.) 951 and note, Ann. Cas. 1913 D 1120 and note; Hagert v. Hagert, 22 N. D. 290, 33

and in some states actions for support are directly authorized by statute.[63] In the absence of such statutory or equitable remedies, the duty has commonly been enforced in two ways: first, by criminal proceedings instituted by the State; and secondly, by suit by a third person who has furnished to the destitute wife the things necessary for her support.[64]

The wife, if the husband has neglected his duty to her in this respect, can use her husband's credit to procure her support; and may do this in spite of his refusal to authorize such credit, or in case of his express denial of credit to her. In the preceding section was discussed the wife's *implied* agency, resting on the husband's supposed consent; this may be called her *imputed agency,* resting on his breach of duty.

If the husband has given his wife neither actual nor apparent authority, the third party who has relieved the wife's necessity, to recover therefor from the husband, must prove the existence, and the breach, of the duty; this involves the proof of three facts; first, that the goods furnished by him were necessaries; secondly, that the husband had wholly neglected to furnish them; and, thirdly, that the wife had not justified his refusal by her own violation of her marital obligations.

L. R. A. (N. S.) 951, Ann. Cas. 1914 B 925.

In Hagert v. Hagert, it was held that a husband, if old, infirm and without means, can maintain a like action for support from a wealthy wife.

In De Brauwere v. Brauwere, 203 N. Y. 460, 38 L. R. A. (N. S.) 508, suit by a wife to recover money which she had taken from her own earnings to support herself and her children was sustained.

63—Cunningham v. Cunningham, 72 Conn. 157, 75 Conn. 64; Harding v. Harding, 144 Ill. 588, 21 L. R. A. 310; Hawkins v. Hawkins, 193 N. Y. 409, 19 L. R. A. (N. S.) 468, 127 Am. St. Rep. 979, 15 Ann. Cas. 371.

64—For the scope and interpretation of statutes punishing "non-support" of wife and children, see State v. Walker, 10 Okla. Cr. 119, L. R. A. 1915 A 564 and note, Ann. Cas. 1916 A 612.

§ 79. What are necessaries. It was said in the older books that "Necessaries consist only of food, drink, clothing, washing, physic, instruction, and a suitable place of residence."[65] But such arbitrary limitations by schedule are less in favor with modern courts; and the usual modern rule is to include whatever is necessary to her reasonable support, in view of the means of the husband, and the standard of living to which they have been accustomed.[66] The rule, however, still includes only necessaries, and not articles of mere luxury.

Applying this general test to the particular cases which have come before the courts for decision, it has been held that medical services,[67] artificial teeth,[68] jewelry of a kind

65—St. John's Parish v. Bronson, 40 Conn. 75, 16 Am. Rep. 17; Sauter v. Scrutchfield, 28 Mo. Ap. 150, 157; Reed v. Crissey, 63 Mo. Ap. 184, 191; Thorpe v. Shapleigh, 67 Me. 238; Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175.

66—**Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362;** Raynes v. Bennett, 114 Mass. 424; Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532; Sultan v. Misrahi, 47 N. Y. Misc. 655; De Brauwere v. De Brauwere, 203 N. Y. 460, 38 L. R. A. (N. S.) 508; Cunningham v. Irwin, 7 S. & R. (Pa.) 247, 260, 10 Am. Dec. 458; Towery v. McGaw, 22 Ky. L. Rep. 155; Tibbetts v. Hapgood, 34 N. H. 420.

In Warner v. Heiden, 28 Wis. 517, 9 Am. Rep. 515, the court quote from Bishop on Mar. & Div., I, 554, as follows: "Necessaries are such articles of food or apparel or medicine, or such medical attendance and nursing, or such provided means of locomotion, or provided habitation or furniture, or such provision for her protection in society and the like, as the husband, considering his ability and standing, ought to furnish to his wife for her sustenance and the preservation of her health and comfort,"—and adds: "This definition of necessaries seems to be strictly correct."

67—Carstens v. Hanselmann, 61 Mich. 428, 1 Am. St. Rep. 606; Mayhew v. Thayer, 8 Gray (Mass.) 172; Cothran v. Lee, 24 Ala. 380; Bevier v. Galloway, 71 Ill. 517; Reed v. Crissey, 63 Mo. Ap. 184; Tibbetts v. Hapgood, 34 N. H. 420; Comstock v. Green, 88 Hun (N. Y.) 64; Black v. Clements, 2 Penn. (Del.) 499.

But if the plaintiff did not profess to be a physician, or to have a knowledge of diseases or remedies, but prescribed for defendant's wife in a clairvoyant trance, the defendant would not be liable therefor. "The law does not recognize the dreams, visions or rev-

suitable to the means of the family,[69] the wages of servants,[70] suitable furniture,[71] the rent of lodgings,[72] a piano under special circumstances,[73] were necessaries; while diamonds,[74] a pew in church,[75] a set of Stoddard's Lectures,[76] have been held not necessaries. The question whether particular articles are or are not necessaries is ordinarily for the jury;[77] but if they are of such a kind as to be clearly

elations of a woman in a mesmeric sleep as necessaries for a wife for which the husband, without his consent, can be held to pay." Wood v. O'Kelley, 8 Cush. (Mass.) 406. See State v. Housekeeper, 70 Md. 162, 14 Am. St. Rep. 340, 2 L. R. A. 587.

68—Clark v. Tenneson, 146 Wis. 65, 33 L. R. A. (N. S.) 426, Ann. Cas. 1912 C 141.

69—Raynes v. Bennett, 114 Mass. 424.

70—Phillips v. Sanchez, 35 Fla. 187; Flynn v. Messenger, 28 Minn. 208, 41 Am. Rep. 279; Wagner v. Nagel, 33 Minn. 348. In Ziegler v. David, 23 Ala. 127, it was held that the services of slaves, employed not to care for the wife but to support her by their earnings, were not chargeable to the husband.

71—Hunt v. DeBlaquiere, 5 Bing. 550; Heney v. Sargent, 54 Cal. 396.

72—Oltman v. Yost, 62 Minn. 261.

73—"It is impossible to state a comprehensive definition of family necessaries. They must be left for cases to define as cases arise. It is not to be doubted that in some circumstances a piano would be necessary to the support of a family, as where the wife should teach music for a livelihood, or a daughter was to be educated, for education may fairly enough be included in the word support. In other circumstances it would be a luxury and not a necessity. The best the judge could do with such a question was to submit it to the jury under all the evidence." Parke v. Kleeber, 37 Pa. St. 251. With this agrees Hamilton v. Lane, 138 Mass. 358.

In Chappell v. Nunn, 41 L. T. Rep. 287, a case in the Irish Q. B., "the hire of a piano and the price of a pianette" were held luxuries and not necessities. See also Verder v. Jansen, 96 Ill. Ap. 328.

74—Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Montague v. Benedict, 3 Barn. & Cressw. 631, 10 E. C. L. 205.

75—St. John's Parish v. Bronson, 40 Conn. 75, 16 Am. Rep. 17.

76—Shuman v. Steimel, 129 Wisc. 422, 116 Am. St. Rep. 961, 7 L. R. A. (N. S.) 1048, 9 Ann. Cas. 1064.

77—Thorpe v. Shapleigh, 67 Me. 238; Sauter v. Scrutchfield, 28 Mo. Ap. 150; Parke v. Kleeber, 37 Pa. St. 251; Eames v. Sweetser, 101 Mass. 78; Raynes v. Bennett, 114 Mass. 424; Willey v. Beach, 115 Mass. 559; Hamilton v. Lane, 138

luxuries rather than necessaries, the question may be determined by the court as matter of law.[78]

There are some classes of expenditure which require especial consideration. *Money* furnished to the wife to enable her to supply herself with necessaries is not recoverable at law;[79] but there is a strong and well considered line of cases holding that if one furnish money to the wife, and she in fact use it for the purchase of necessaries, equity will regard the lender as standing in the shoes of the merchant to whom his money went, and he may recover his advances by a bill in chancery.[80]

Mass. 358; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362.

In McQuillen v. Singer Mfg. Co., 99 Pa. St. 586, an instruction that a sewing machine was a necessity, and in Willey v. Beach, 115 Mass. 559, one that it was not a necessity, were disapproved, both courts holding that the question should have been submitted to the jury as one of fact under all the circumstances.

78—Phillipson v. Hayter, L. R. 6 C. P. 43; Sauter v. Scrutchfield, 28 Mo. Ap. 150.

79—Knox v. Bushnell, 3 Com. B. (N. S.) 333, 91 E. C. L. 334; Walker v. Simpson, 7 Watts & S. (Penn.) 83, 42 Am. Dec. 216; Gill v. Reed, 5 R. I. 343, 73 Am. Dec. 73; Marshall v. Perkins, 20 R. I. 34., 78 Am St. Rep. 841. The last two cases, however, hold that "if the lender lays out the money, or sees it laid out for necessaries, he may charge them as provided by himself;" and rest upon the fact that there was no satisfactory evidence that the money was actually expended for necessaries; and Kenny v. Meislahn, 69 App. Div. (N. Y.) 572, 75 N. Y. Supp. 81, declares the rule to be the same in N. Y.

See also the cases in the next note.

80—Kenyon v. Ferris, 47 Conn. 510, 36 Am. Rep. 86; Harris v. Lee, 1 P. Wms. 482; Dean v. Soutten, L. R. 9 Eq. Cas. 131; Jenner v. Morris, 3 DeG. F. & J. 45; Walker v. Simpson, 7 W. & S. (Penn.) 83, 42 Am. Dec. 216; Reed v. Crissey, 63 Mo. Ap. 184; Leuppie v. Osborn, 52 N. J. Eq. 637.

These cases are criticised and declared to be unsound in Skinner v. Tirrell, 159 Mass. 474, 38 Am. St. Rep. 447, 21 L. R. A. 673; but the equitable doctrine as stated in the text is supported by so strong a body of precedents, and the justice of requiring the husband to repay loans made to an abandoned wife, when they were needed and actually used to procure necessaries for her, is so obvious, that the English equity doctrine seems likely still to be followed. In 1911, the N. Y. Court of Appeals followed Kenyon v. Ferris, and refused its approval

Legal services rendered to the wife are a necessary for which the husband is liable to pay, if the services were really necessary to the wife's defense against a prosecution,[81] or even in instituting legal proceedings, when such proceedings were necessary for her protection.[82]

Proceedings instituted upon reasonable grounds for a divorce *a mensa et thoro,* or judicial separation, come within the preceding classification, and her attorney may recover from the husband therefor.[83] An action for an absolute divorce, or divorce *a vinculo matrimonii,* is viewed differently in this respect; other necessaries are furnished to the wife to sustain her as the wife of the defendant; divorce proceedings are to break the marital relation, and to restore to her freedom as a single woman, or possibly the opportunity of remarriage. For these the husband is commonly, in the American courts, held not liable in any form of proceeding.[84] If the husband sues her for divorce,

to Skinner v. Tirrell. De Brauwere v. De Brauwere, 203 N. Y. 460, 38 L. R. A. (N. S.) 508.

81—**Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532;** Shepard v. MacKail, 3 Campbell 326; Warner v. Heiden, 28 Wisc. 517, 9 Am. Rep. 515. But if the prosecution against her be for adultery, and she is living apart from her husband, counsel is put upon inquiry as to whether she left the husband by her own fault, and he cannot recover for his services in his suit against the husband without proving her innocent of adultery. Peaks v. Mayhew, 94 Me. 571.

82—Shepard v. MacKail, 3 Camp. 326; Billing v. Pilcher, 7 B. Mon. (Ky.) 458.

83—Rice v. Shepherd, 12 C. B. (N. S.) 332, 104 E. C. L. 332; Brown v. Ackroid, 5 El. & Bl. 819, 85 E. C. L. 819. So of necessary legal advice as to her rights; Wilson v. Ford, L. R. 3 Eq. Cas. 63. But see Ladd v. Lynn, 2 Mees. & Wels. 265.

84—Shelton v. Pendleton, 18 Conn. 417; Williams v. Munroe, 18 B. Mon. (Ky.) 514; Pearson v. Darrington, 32 Ala. 227, 255; Dow v. Eyester, 79 Ill. 254; Isbell v. Weiss, 60 Mo. Ap. 54; Yeiser v. Lowe, 50 Neb. 310; Dorsey v. Goodenow, Wright (Ohio) 120; Wing v. Hurlburt, 15 Vt. 607, 40 Am. Dec. 695; Johnson v. Williams, 3 Greene (Iowa) 97, 54 Am. Dec. 491; Kincheloe v. Merriman, 54 Ark. 557, 26 Am. St. Rep. 60; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120; Clark v. Burke, 65 Wisc. 359, 56 Am. Rep. 631; Zent v. Sullivan, 47 Wash. 315, 13 L. R.

the practice of the divorce courts commonly requires him to make an allowance to the wife for her defense, as a condition to his prosecution of the action; this remedy is exclusive; she is bound to apply in the divorce court for such an allowance, and her attorney can not maintain an independent action for his services.[85]

A. (N. S.) 244; Peck v. Marling, 22 W. Va. 708, 719.

In England, the distinction between the two classes of divorces is denied, and the husband held liable for the solicitor's services in procuring an absolute divorce for his cruelty and adultery. Ottaway v. Hamilton, L. R. 3 C. P. Div. 393; Stocken v. Patrick, 29 L. T. Rep. 507. The English rule is followed in Handy v. Stockbridge, 62 Md. 422, 50 Am. Rep. 229, and in Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637.

The cases on both sides are given in Meaher v. Mitchell, 112 Me. 416, Ann. Cas. 1917 A 688 and note, L. R. A. 1915 C 467 and note. This opinion gives Georgia, Iowa, Maryland, Texas and West Virginia as following the English rule.

85—**Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175;** Cooke v. Newell, 40 Conn. 596; Wing v. Hurlburt, 15 Vt. 607, 40 Am. Dec. 695; Coffin v. Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769; Clark v. Burke, 65 Wisc. 359, 56 Am. Rep. 631. But where the wife employs counsel to defend her in a divorce action brought by the husband, who perform services and apply in the divorce court for an order compelling the husband to pay them, and he then withdraws the action, they can sue him for their services. Gossett v. Patten, 23 Kan. 340.

Where the wife, after a charge had been made against her in a cross-bill, withdrew her appearance and judgment was entered for the husband, her counsel was refused a judgment against the husband for her services. Wick v. Beck, 171 Iowa 115, L. R. A. 1915 F 1162, Ann. Cas. 1917 A 691.

In Porter v. Briggs, 38 Iowa 166, 18 Am. Rep. 27, it was held that counsel employed to defend the wife when sued by the husband for divorce on the ground of adultery, which defense was successful, can sue the husband for their fees. The court said: "It can hardly be doubted that if a wife is charged in a legal proceeding by a stranger with the crime of adultery, the husband would be liable for all necessary expenses incurred in establishing her innocence. * * * The rights of the wife are in nowise changed, nor does the necessity for protection cease, when her personal safety, liberty or good name, are assailed by the husband himself. In truth, her claim for the protection of the law against such attacks by the husband is stronger than if made by a stranger. * * *

Support of the wife's relatives is not included within the duty resting on the husband, although they may be dependent upon her, and the legal duty of supporting them may rest upon her. This sometimes produces a situation of injustice and hardship. It would seem that when a man married a woman having dependent children, the same equity which made him responsible at common law for her ante-nuptial debts would require him to assume this parental obligation; but the law has never recognized this duty.[86] Any injustice that may have existed upon this point under the common law is less evident at the present time, when by statute a married woman usually retains the control of her property and her full contractual capacity.

The husband is bound, upon the wife's death, to provide *a suitable burial* for her; and this is so, although she left an abundant estate of her own.[87] Therefore, if she were

It is usually enforced by orders taxing such expenses as costs. * * * There can be no good reason why it may not be enforced in an independent action at law." This argument is at least as convincing as the conventional argument which has been handed down in the prevailing line of precedents to the contrary.

86—2 Kent's Com. 192; Schouler on Dom. Rel., §§ 237, 273; Tubb v. Harrison, 4 T. R. (Durnf. & East) 118; Rex v. Munden, 1 Stra. 190; Freto v. Brown, 4 Mass. 675; Brookfield v. Warren, 128 Mass. 287; Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301; Englehart v. Yung, 76 Ala. 534; Menefee v. Chesley, 98 Iowa 55; Re Besondy, 32 Minn. 385, 50 Am. Rep. 579.

The Washington Supreme Court declared in White v. McDowell, 74 Wash. 44: "We are satisfied that there is a duty upon a stepfather to support the minor children of his wife, and that this duty is something more than mere charity." This was really a dictum, but was repeated in Magnusson v. O'Dea, 75 Wash. 574, 48 L. R. A. (N. S.) 327, Ann. Cas. 1915 B 1230. And see Williamson v. Williamson, 183 Ky. 435, 3 A. L. R. 799 and note.

If the stepfather treats the children as his own and takes them into his family, authority to supply them with necessaries may be implied against him. Monk v. Hurlburt, 151 Wis. 41, 42 L. R. A. (N. S.) 535 and note.

87—Bowen v. Daugherty, 168 N. C. 242, Ann. Cas. 1917 B 1161 and note.

deserted by him and buried by strangers, they can recover the expense from the husband;[88] and if he is her administrator or executor, he has no right to charge the expenses of her burial and funeral in his administration account.[89] In some of the states, by statute, the estate of a married woman has been made primarily liable for her funeral expenses,[90] thus setting aside the above common law rule.

§ 80. The default of the husband. It is also essential for the plaintiff who seeks to recover from the husband for necessaries furnished to his wife to prove that she was destitute of them. It has already been pointed out that an agency of the wife cannot be implied against a husband from the mere fact of the marriage, and that the

88—**Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670;** Scott v. Carothers, 17 Ind. Ap. 673; Re Stewart, (N. J. Eq.) 22 Atl. 122; Sears v. Giddey, 41 Mich. 590, 32 Am. Rep. 168; Jenkins v. Tucker, 1 H. Bl. 90; Ambrose v. Kerrison, 10 C. B. 776, 70 E. C. L. 776.

89—Stonesifer v. Shriver, 100 Md. 24; Smyley v. Reese, 53 Ala. 89, 25 Am. Rep. 598; Galloway v. McPherson, 67 Mich. 546, 11 Am. St. Rep. 596; Re Weringer, 100 Cal. 345; Kenyon v. Brightwell, 120 Ga. 606; Brand v. Brand, 116 Ky. 785, 63 L. R. A. 206; Re Waesch, 166 Pa. St. 204; Staples's Ap., 52 Conn. 425. But in New York, while the husband is under legal obligation to bury his wife, and can be sued for her funeral expenses by the person who has furnished them, he has a right to be repaid from her estate, if she left any. McCue v. Garvey, 14 Hun 562, 110 App. Div. 76.

90—For instance, section 5043, Gen. Stat. of Conn. 1918, first enacted in 1895, provides that "The funeral expenses of a married woman shall be paid out of her estate, if sufficient therefor, but if not sufficient therefor they shall be paid by the husband;" thus overruling Staples's Appeal, *supra.* See Schneider v. Breier, 129 Wis. 446, 6 L. R. A. (N. S.) 917; Buxton v. Barrett, 14 R. I. 40; McClellan v. Filson, 44 Ohio St. 184, 54 Am. St. Rep. 814; Constantinides v. Walsh, 146 Mass. 281, 4 Am. St. Rep. 311. In some of these cases the statute relied on was a mere general provision for the payment of the funeral expenses from the estate of a deceased person, not referring particularly to married women, or purporting to relieve a husband from the liability. To give such an interpretation to such a statute seems questionable, and is denied in Kenyon v. Brightwell, 120 Ga. 606.

marital couple were living together, if she were adequately supplied with the articles in question;[91] still less, where his agency and consent are admitted to be lacking, can liability be imposed upon him without proving his default.[92]

And the plaintiff must also, if the marital couple are living apart, show that the separation was not due to the fault of the wife. This requirement opens for consideration the entire merits of the separation. If the wife left the husband without sufficient justification, she carries with her neither an implied nor an imputed agency to procure support at his expense.[93] If by her misconduct she gave him justification for leaving her, the same result follows.[94]

91—See Wanamaker v. Weaver, and other cases cited in notes (54) and (55), *ante*.

92—Devendorf v. Emerson, 66 Iowa 698; Woodward v. Barnes, 43 Vt. 330; Barr v. Armstrong, 56 Mo. 577; Cany v. Patton, 2 Ashm. (Pa.) 140; Compton v. Bates, 10 Bradw. (Ill. Ap.) 78; Kemp v. Downham, 5 Har. (Del.) 417; Baker v. Barney, 8 Johns. (N. Y.) 72; Kimball v. Keyes, 11 Wend. (N. Y.) 33.

Therefore, if husband and wife make a separation agreement, by which they are to live separate and she is to accept a certain sum for her support, he is not liable for bills contracted by her, as long as she makes no offer to return to him and he pays the stipulated sum, although it is insufficient for her proper support. Though the contract might not free the husband from liability for her support if she should offer to return to him, it makes his consent to her absence conditional on her supporting herself within the allowance. Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 77; Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 40; Brown v. Brown, 5 Gill (Md.) 249.

93—**Harttmann v. Tegart, 12 Kan. 177;** Denver Dry Goods Co. v. Jester, 60 Colo. 290, L. R. A. 1917 A 957 and full note; Rea v. Durkee, 25 Ill. 503; Oinson v. Heritage, 45 Ind. 73, 15 Am. Rep. 258; Peaks v. Mayhew, 94 Me. 571; McCutchen v. McGahay, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; Thorne v. Kathan, 51 Vt. 520; Belknap v. Stewart, 38 Neb. 304, 41 Am. St. Rep. 729; Collins v. Mitchell, 5 Har. (Del.) 469; Morgenroth v. Spencer, 124 Wisc. 564; Bevier v. Galloway, 71 Ill. 517; Pool v. Everton, 50 N. C. 241; Benjamin v. Dockham, 132 Mass. 181; Constable v. Rosener, 82 App. Div. (N. Y.) 155, affd. in 178 N. Y. 587.

94—Sawyer v. Richards, 65 N. H. 185. But under the terms of the Iowa Code, Sec. 3166 ("Nei-

Even if she were driven away by such abuse as makes the separation attributable to the husband, a subsequent act of adultery by her would forfeit her claim upon him.[95] And the party who has furnished her supplies, intending to enforce the husband's liability, in all these respects stands in her shoes and must be prepared to justify her right as against the husband.[96]

The separation of the marital couple may be attributable to the fault of neither party, as if they parted temporarily by consent, to meet some exigency which required them to live at different places. In such case the wife's want of necessary articles, and the husband's refusal to furnish them, would undoubtedly justify recovery from him by one who had supplied the needs.[97] The presumption of agency because of the marital cohabitation being lacking, it would be incumbent on the plaintiff to clearly prove all the facts essential to the liability imputed by law.

A case meriting especial mention is that of the insanity and consequent confinement of the wife; here the husband is deprived of her society and help, and yet it is the clear

ther husband nor wife can remove the other nor the children from the homestead without the consent of the other"), a husband who had driven out his wife, though justified by her misconduct, is liable for her necessary support. Baker v. Oughton, 130 Iowa 35. And if the husband quits her because of her adultery, he cannot be compelled to support her, though he himself may have been guilty of prior adultery unknown to her. Decker v. Decker. 193 N. Y. 409. 19 L. R. A. (N. S.) 468, 127 Am. St. Rep. 979

95—Gill v. Read. 5 R. I. 343, 73 Am. Dec. 73; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362.

96—Morgenroth v. Spencer, 124 Wis. 564; Walker v. Simpson. 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; Bevier v. Galloway, 71 Ill. 517; Billing v. Pilcher. 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523; Sturbridge v. Franklin. 160 Mass. 149; Crittenden v. Schermerhorn. 39 Mich. 663, 33 Am. Rep. 40.

97—Pearson v. Darrington, 32 Ala. 227, 243; Ross. v. Ross. 69 Ill. 569; Burkett v. Trowbridge, 61 Me. 251; Oltman v. Yost, 62 Minn. 261; Walker v. Laighton. 31 N. H. 111; Baker v. Barney. 8 Johns. (N. Y.) 72, 5 Am. Dec. 326; Lockwood v. Thompson, 12 Johns. (N. Y.) 248; Frost v. Willis, 13 Vt. 202.

dictate of justice and humanity, as well as the rule supported by the preponderating line of decisions, that he is liable for her support.[98]

§ 81. The credit must have been given to the husband. The above discussion, both as to the implied agency of the

98—"It is undoubtedly true that a husband is only bound to support his wife at his own home, and when he is both able and willing to support her there and she wilfully abandons him, she does not carry with her the credit of the husband, nor can she impose any liability upon him. But an insane wife is incapable of abandoning her husband. When a wife is suffering under such affliction, it is the duty of the husband—a duty imposed by the relation he bears to her as well as by the plainest dictates of humanity—to protect and support her. This duty the testator neglected. It would be a reproach to our jurisprudence if, under such circumstances, he could escape liability to those who, to some small degree, extended to his suffering wife that protection and support which he so cruelly and so persistently withheld." **Goodale v. Lawrence, 88 N. Y. 513, 42 Am. Rep. 259.**

The Wisconsin Supreme Court has lately expressed a contrary opinion, saying: "The duty of the husband for the maintenance of his wife does not extend to the support of her while she is away from his home. It would seem that when a wife by due process of law, as a charity to her and protection to others, is taken from the society of her husband without fault of his, and confined in an asylum for treatment or safety, or both, there is no refusal by him to support her in his home, even if he is an actor as regards setting the legal machinery in motion for the purpose of affording her the benefit of the public charity and guardianship, nor is there in such a case any consent by the husband to the wife's absense from his home, within the meaning of the common law rule clothing her with his credit for the purpose of her support." Richardson v. Stuesser, 125 Wis. 68, 69 L. R. A. 829. 4 Ann. Cas. 784. The Wisconsin court cites as supporting its decision cases from Indiana, Iowa and Nebraska, but none of them support any such limitation of the husband's obligation. Brookfield v. Allen, 6 Allen (Mass.) 185; Wray v. Wray, 33 Ala. 187. and Davis v. St. Vincent Institute, 9 C. C. A. 501, are directly opposed to the Wisconsin case on principle; and other cases hold that the plaintiff may recover from the husband on the language of the respective statutes. Watt v. Smith, 89 Cal. 602; Bangor v. Wiscassett, 71 Me. 535; Springfield v. Demott, 13 Ohio 104; Martin v. Beuter, 79 W. Va. 604. 4 A. L. R. 1106 and note. See Senft v. Carpenter, 18 R. I. 545.

wife to purchase household articles on her husband's credit, and the liability imputed to him for her support, assumes that the goods were in fact furnished on the credit of the husband. If the wife procured the articles by pledging, not his credit, but her own, and the tradesman sells and charges them to her, he cannot afterwards claim to hold the husband for them.[99] But if the wife, living with her husband in the marital relation, orders household goods without specifying to whom they are to be charged, the presumptive liability is upon him, she will be presumed to have acted as his agent, and will not be personally liable unless she expressly pledged her own credit.[100]

99—Gafford v. Dunham, 111 Ala. 551; Tuttle v. Hoag, 46 Mo. 38, 2 Am. Rep. 481; Mitchell v. Treanor, 11 Ga. 324. 56 Am. Dec. 421; Bell v. Rossignol, 143 Ga. 150, L. R. A. 1915 D 1184 and note; Shelton v. Pendleton, 18 Conn. 417; Taylor v. Shelton. 30 Conn. 122; Black v. Clements, 2 Penn. (Del.) 499; Bonney v. Perham, 102 Ill. Ap. 634; Swett v. Penrice. 24 Miss. 416; Hill v. Goodrich. 46 N. H. 41; Carter v. Howard, 39 Vt. 106.

Contra, Furlong v. Hyson, 35 Me. 332; Baker v. Carter, 83 Me. 132, 23 Am. St. Rep. 764; Moore v. Copeley, 165 Pa. St. 294, 44 Am. St. Rep. 664; Edmiston v. Smith, 13 Idaho 645, 121 Am. St. Rep. 294. 14 L. R. A. (N. S.) 871. It does not defeat the husband's liability that the wife asked the merchant not to call on the husband for the bill, and said she would pay it herself, if he in fact charged the husband. Day v. Burnham, 36 Vt. 37. But see Franklin v. Foster, 20 Mich. 75.

As to the wife's liability for household goods ordered by her, see the extended note. Ann. Cas. 1917 C 561.

100—"He is liable for such necessaries furnished to his wife and children, whether with or without his knowledge. His wife is not liable, unless she expressly undertakes to become so. Her undertaking is never presumed, but must be shown affirmatively. The act of delivery of the goods to her, or the fact that the creditor has chosen to charge them to her, is not enough. This might tend to show the desire of the creditor to reach her estate, but it does not tend to show her agreement that he shall do so." Moore v. Copeley, 165 Pa. St. 294, 44 Am. St. Rep. 664. With this agree Powers v. Russell, 26 Mich. 179; Flynn v. Messenger, 28 Minn. 208. 41 Am. Rep. 279; Connerat v. Goldsmith, 6 Ga. 14; Shaw v. Thompson. 16 Pick. Mass.) 198, 26 Am. Dec. 655; Clark v. Tenneson, 146 Wis. 65, 33 L. R. A. (N. S.) 426 and note.

This rule is altered by statute in many of the states where the wife has been given independent contractual power. Thus, by Sec. 5275 of the Gen. Stat. of Conn., 1918, "Both shall be liable when any article purchased by either shall have in fact gone to the support of the family, or for the joint benefit of both, or for the reasonable apparel of the wife, or for her reasonable support while abandoned by the husband."

The various statutes are reviewed in the note, Ann. Cas. 1917 C 564-576.

CHAPTER XII

THE LEGAL CAPACITY OF THE MARRIED WOMAN.

§ 82. **To make a contract.** Since by marriage the control and income of all the wife's real estate, the absolute title to her personal property, and the right to collect her choses in action, were at the common law conferred upon the husband, it is evident that she had very little occasion or opportunity to exercise any power of contract. But the merger of her legal existence in that of her husband, the loss of her legal personality, rendered even more impossible the recognition of any contractual capacity on her part. Speaking generally and broadly, the wife could make no contract of any kind,[1] not even for her necessary support.[2] It made no difference that the husband consented to, or united with her in making, the contract.

There was, therefore, to give a striking illustration, no legal way in which a contract could be made for the sale of the wife's land; even under statutes by which the husband and wife, executing a deed together, could convey the wife's land, they were not able to make a contract to

1—2 Kent's Com. 150; Reeve on Dom. Rel. 98; Canal Bank v. Partee, 98 U. S. 325; Morse v. Toppan. 3 Gray (Mass.) 411; Thompson v. Minnich. 227 Ill. 430; Dorrance v. Scott. 3 Whart. (Pa.) 309. 3 Am. Dec. 509; Little v. Hazlett, 197 Pa. St. 591; Austin v. Davis, 128 Ind. 472, 25 Am. St. Rep. 456. 12 L. R. A. 120; 1st Nat'l Bank v. Shaw, 109 Tenn. 237, 97 Am. St. Rep. 840, 59 L. R. A. 498; Harris v. Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780; Burton v. Marshall, 4 Gill (Md.) 487, 45 Am. Dec. 171; Ross v. Singleton, 1 Del. Ch. 149, 12 Am. Dec. 86; Pickens v. Knisely, 36 W. Va. 794; Martin v. Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245.

2—Shaw v. Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; Valentine v. Bell, 66 Vt. 280; Hayward v. Barker, 52 Vt. 429, 36 Am. Rep. 762.

convey it in future.[3] The wife's disability to contract likewise rendered it impossible for her to give a power of attorney to another person to contract for her; since such a power of attorney rested for its force on her contractual power.[4] And such covenants, admissions or recitals, as would operate an estoppel against a person *sui juris*, do not estop the wife.[5]

3—**Thompson v. Minnich, 227 Ill. 430;** Butler v. Buckingham, 5 Day (Conn.) 492, 5 Am. Dec. 174; Lane v. McKeen, 15 Me. 304.

A deed of lands given by a married woman with her husband, containing covenants of title, but not acknowledged in the manner required by the statute, and consequently ineffective as a deed, is not enforceable as an agreement to convey; nor are the covenants of title of any effect against her. Martin v. Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245. See note 5.

4—**Freeman's Appeal, 68 Conn. 531, 57 Am. St. Rep. 112, 37 L. R. A. 452;** Forsyth v. Barnes, 228 Ill. 326, 10 Ann. Cas. 710; Sumner v. Conant, 10 Vt. 1.

But it was held in Williams **v.** Paine, 169 U. S. 55, that a statute empowering a married woman to convey land, and to execute and acknowledge a deed for the purpose, by implication empowered her to give a power of attorney to another to execute a deed in her behalf.

5—Drury v. Foster, 2 Wall. (U. S.) 24; Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; Todd v. Pittsburgh R. Co., 19 Ohio St. 514; Curry v. American Freehold Co., 107 Ala. 429, 54 Am. St. Rep. 105. She is not, therefore, estopped from pleading coverture by the fact that she obtained the credit by falsely representing that she was unmarried. Keen v. Coleman, 39 Pa. St. 99, 80 Am. Dec. 524; Lowell v. Daniels, *supra*.

It is said in certain early cases that the covenant contained in the deed of a married woman, though it imposes no contractual obligation upon the married woman, is effective against her by way of estoppel; but this seems to mean nothing more than that, under the statutes or usages permitting her to make a deed by executing it jointly with her husband, the deed with its covenants will be effective to prevent her afterward claiming the land inconsistently therewith. See Foster v. Wilcox, 10 R. I. 443, 14 Am. Rep. 698, and the cases there cited. Such covenants of warranty do not estop her from asserting an after acquired title. Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167; Wadleigh v. Glines, 6 N. H. 17, 23 Am. Dec. 705; Shaffer v. Gurtzmacher, 6 Iowa 137; Hoffer v. Demarest, 21 N. J. L. 525; Botsford v. Wilson, 75 Ill. 133; *contra*, Hill v. West, 8 Ohio, 222, 31 Am. Dec. 442; Dukes **v.** Spangler, 35 Ohio St. 119.

The majority of American courts have held that a contract made by the wife was not merely voidable but void; the chief practical result of which is that a debt arising from such contract is not made enforceable by the promise of the wife, after the marriage has been terminated by death or divorce, to pay it; or, reaching the same result differently, a contract obligation assumed by a married woman is not a sufficient consideration for her promise, after discoverture, to pay the same.[6] But if she had sole and separate estate, against which her contract obligation was enforceable in equity, that equitable liability will support a promise made after discoverture.[7] And a few cases hold that the later promise is enforceable, if value had actually been received by the promisor, while married, under the invalid contract.[8]

A conveyance by her of her expectancy as heir of a living person is not binding by way of estoppel when the ancestor dies. Taylor v. Swafford, 89 Neb. 409, 25 L. R. A. (N. S.) 442.

6—Eastwood v. Kenyon, 11 Ad. & El. 438; Austin v. Davis, 128 Ind. 472, 25 Am. St. Rep. 456, 12 L. R. A. 120; Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780; Thompson v. Hudgins, 116 Ala. 93, 118; McFarland v. Heim, 127 Mo. 327, 48 Am. St. Rep. 629; Gilbert v. Brown, 27 Ky. L. Rep. 1248, 7 L. R. A. (N. S.) 1053; Thompson v. Minnich, 227 Ill. 430; Valentine v. Bell, 66 Vt. 280; Condon v. Barr, 49 N. J. L. 53; Kent v. Rand, 64 N. H. 45; Foster v. Wilcox, 10 R. I. 443, 14 Am. Rep. 698; Hayward v. Barker, 52 Vt. 429, 36 Am. Rep. 762; First Nat. Bk. v. Bertoli, 87 Vt. 297, Ann. Cas. 1917 B 590; Porterfield v. Butler, 47 Miss. 165, 12 Am. Rep. 329.

7—Hubbard v. Bugbee, 58 Vt. 172; Sherwin v. Sanders, 59 Vt. 499, 59 Am. Rep. 750; Condon v. Barr, 49 N. J. L. 53; Craft v. Rolland, 37 Conn. 491; Long v. Rankin, 108 N. C. 333; Wilcox v. Arnold, 116 N. C. 708.

8—Goulding v. Davidson, 26 N. Y. 604. And in Pennsylvania and Tennessee the supposed moral obligation of a woman to pay debts contracted by herself during coverture is held to be a sufficient consideration to support a promise made by her after the coverture was ended. The local cases are reviewed in Rathfon v. Locher, 215 Pa. St. 571; Parker v. Cowan, 1 Heisk (Tenn.) 518. The Louisiana cases also hold that the wife's contract is made binding upon her by a ratification after she became widowed. Lafitte v. Delogny, 33 La. Ann. 665; Brownson v. Weeks, 47 La. Ann. 1042.

The only exception to the wife's disability recognized by the common law was in the event that her husband had been banished from the realm, or was an alien living abroad; that he had abandoned her was insufficient; even that the husband and wife had separated by agreement, after some early conflict in the cases, was at length decided by the English courts to be insufficient to give her contractual capacity.[9] But early statutes in the United States commonly extended the power to make contracts to married women who had been abandoned by their husbands.[10]

The power of contracting with reference to her sole and separate estate established by the courts of equity, and the grant of general contractual power by modern reform statutes, will be discussed in later chapters.

§ 83. **To convey her real estate.** The wife's disability to make an ordinary contract applied, *a fortiori,* to her execution of a deed of real estate.[11] But so great was the inconvenience of such a state of law that the practice of pass-

9—2 Kent's Com. 159-161; Gregory v. Paul, 15 Mass. 31; Abbot v. Bayley, 6 Pick. (Mass.) 89; Shaw v. Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; Harris v. Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; Musick v. Dodson 76 Mo. 624, 43 Am. Dec. 780; Ross v. Singleton, 1 Del. Ch. 149, 12 Am. Dec. 86; Robinson v. Reynolds, 1 Aiken (Vt.) 174, 15 Am. Dec. 673.

Rhea v. Rhenner, 1 Pet. (U. S.) 105, holds that an abandoned wife, carrying on business, may contract debts and be sued thereon, ignoring the narrower distinction taken in the foregoing cases; and this is followed in Love v. Moynehan, 16 Ill. 277, 63 Am. Dec. 306.

See Barber v. Barber, 21 How. (U. S.) 582, 589, where the exceptions are given, applying to the analogous question of suit by a married woman.

10—Ex parte Cole, 28 Ala. 50; Baldwin v. Second St. R. Co., 77 Cal. 390; Moore v. Stevenson, 27 Conn. 14; McDanell v. Landrum, 87 Ky. 404, 12 Am. St. Rep. 500; Wilkinson v. Stanbrough, 1 La. Ann. 264; Carstens v. Hanselmann, 61 Mich. 426, 1 Am. St. Rep. 606; Yeatman v. Bellmain, 6 Lea (Tenn.) 488.

11—2 Bl. Com. 293; Concord Bank v. Bellis, 10 Cush. (Mass.) 276; Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; Shaw v. Russ, 14 Me. 432; Durant v. Ritchie, 4 Mason (U. S. C. C.) 45, Fed. Cas. No. 4190.

ing title by a fictitious suit, known as "levying a fine" or "suffering a common recovery," which had been originally devised as a mode of making a legal conveyance of entailed land, was extended to the land of married women, the husband being required to unite with the wife in the fine or recovery.[12] At an early date the older American colonies, either by statute or by local usage, permitted the conveying of the real estate of the wife by a deed executed by both husband and wife, the separate examination and acknowledgment of the wife being usually required; these statutes and usages established what might be called an American common law method of deeding the wife's land,[13] and in

12—**Martin v. Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245;** Williams v. Paine, 169 U. S. 55, 64; Thompson v. Minnich, 227 Ill. 430; Durant v. Ritchie, 4 Mason (U. S. C. C.) 45, Fed. Cas. No. 4190.

See the full and interesting discussion of the history of the law in both the majority and dissenting opinions in Albany Fire Ins. Co. v. Bay, 4 N. Y. 32.

13—"It has been an immemorial usage in the sale of the wife's lands that a deed of conveyance executed by husband and wife, acknowledged and registered, shall pass the wife's lands, not only as to her husband, but as to her and her heirs. This usage was originally founded in necessity; as it was often convenient for families to alienate the wife's land, and as a conveyance by fine was here unknown. The celebrated Mr. Reed, the first lawyer in his time, resolved this usage into New England common law. But whatever was the origin of the usage, it has prevailed without interruption beyond the memory of man, and it cannot now be disallowed without shaking very many of the existing titles to real estate; and it must now be considered as the law of the land. If therefore the wife will voluntarily join with her husband in executing a conveyance of her land, she is bound by her deed so far as it operates to pass her estate." Fowler v. Shearer, 7 Mass. 14.

See 2 Kent's Com., p. 150-154; Durant v. Ritchie, 4 Mason (U. S. C. C.) 45, Fed. Cas. No. 4180; Martin v. Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; Gordon v. Haywood, 2 N. H. 402. The deed of a married woman without the joinder of her husband in the execution was wholly void, in equity as well as at law. Osborne v. Cooper, 113 Ala. 405, 59 Am. St. Rep. 119. The Conn. Statute of 1723 (6 Col. Rec. of Conn. 425) assumes that before its passage the husband could convey his wife's lands by his own sole deed, and provides "that for the future.

1833 they were copied by England herself.[14]

§ 84. **To purchase real estate.** A wife could, of course, at the common law make no contract for the purchase of real estate, so as to bind herself to a contractual obligation. If, however, a deed of real estate was executed to her, the grantor, rather than the grantee, was the party exercising contractual power; the deed being presumably beneficial to the wife, no express acceptance on her part was necessary. The deed therefore vested the title in her for the time being, but subject to be avoided by the husband, by the wife after discoverture, or by her heirs if she should have died before her husband, or have failed to ratify the deed after becoming *sui juris*.[15]

§ 85. **To make a will.** By the English common law a married woman had no power to make a devise of real estate, and could make a bequest of personal property only by the particular consent of her husband, a general agreement by him being ineffective to give her that power. It is evident that the husband's consent was the operative fact, rather than the testamentary act of the wife. It was also held that a will executed by a *feme sole* was avoided by her marriage.[16] In the early American cases, accord-

any real estate whereof any woman at the time of her marriage is seised as her estate of inheritance, or does during such coverture become so, either by descent or otherwise, shall not be alienable by her husband's deed, without her consent, testified by her hand and seal to such deed, and acknowledgment of the same." For the later form of this statute, and the wife's power under it, see Stafford Savings Bank v. Underwood, 54 Conn. 2.

14—St. 3 and 4 William IV, Ch. 74.

15—2 Bl. Com. 292; 2 Kent's Com. 150.

The Massachusetts court even went to the extreme of holding in **Concord Bank v. Bellis, 10 Cush. (Mass.) 276,** that where a deed had been made to a married woman, and a mortgage executed by her to the grantor upon a single agreement and as one transaction, the title passed to her by the deed, but the mortgage was void.

16—2 Bl. Com. 498. Judge Reeve discusses this topic at length and argues that the wife had full power of devising her

ingly, the wife was held to have no testamentary power unless conferred by express statute.[17] But, beginning at an early date, statutes giving her this power have been passed in most of the states. It has commonly been held that such statutes by implication repealed the rule that the will of a *feme sole* is revoked by her subsequent marriage, since that rule itself rested on the proposition that by the marriage, the testatrix ceasing to have testamentary power, the former will would become unalterable, and therefore lose one of the essential qualities of a will.[18]

§ 86. To commit torts and crimes. The wife's limited liability for torts committed during the marriage has already been discussed; she was liable to be sued, only as

real estate at common law, and that her disability in Blackstone's time depended wholly upon the terms of the Statute of Wills, 34 and 35 Henry VIII, Ch. 5. Reeve on Dom. Rel., Ch. 11 and 12. In accordance with these views, the Conn. Supreme Court of Errors, in 1778, reversed a Superior Court decision (Adams v. Kellogg, Kirby (Conn.) 195) in which the power had been denied. For a report of this reversal see 2 Day (Conn.) 186. But in 1805 this appellate decision was overruled, and the power was held not to exist at common law. Fitch v. Brainard, 2 Day (Conn.) 163, 188-194. The legislature soon after passed a statute conferring full testamentary power upon married women.

17—4 Kent's Com. 505; **Cutter v. Butler, 25 N. H. 343, 57 Am. Dec. 330 and note;** Osgood v. Breed, 12 Mass. 525; Fitch v. Brainard, 2 Day (Conn.) 163; Marston v. Norton, 5 N. H. 205; West v. West. 10 S. & R. (Pa.) 445. In Ohio the statute of 1808, giving the power to make a will to "every female person aged 18 years and upward, being of sound mind," was held to remove the common law disability of married women. Allen v. Little, 5 Hammond (Ohio) 65.

18—See, for a very satisfactory discussion and review of the cases, **Kelly v. Stevenson, 85 Minn. 247, 89 Am. St. Rep. 545, 56 L. R. A. 754.** Swan v. Hammond, 138 Mass. 45, 52 Am. Rep. 255, takes the contrary view, but is perhaps distinguishable because of the peculiar terms of the Massachusetts statute. Statutes have been passed in very many of the states making the marriage of either man or woman after the execution of a will operate *ipso facto* as a revocation thereof. These statutes are evidently based on a theory, not that testamentary capacity was lost by the marriage, but that presumably the testator's wishes as to the disposition of his estate would be altered.

a co-defendant with her husband or after his death, for torts which she committed in his absence, or without coercion by him. If he were present at the commission of the tort, his coercion of her was presumed; but this presumption was rebuttable, and if she in fact acted of her own independent will, and not by his command, she was liable. If in fact he commanded or co-operated with her in the tortious act, she is fully absolved by reason of his supposed domination of her will.[19] The law of her criminal liability is similar; but the more urgent demands of criminal justice have led to a slightly narrower limitation of her immunity by the husband's supposed coercion. The husband's mere presence, co-operation, or even command, is not sufficient to excuse her, if in fact she committed the crime voluntarily; to absolve her there must have been actual coercion. "If she commit a theft of her own voluntary act, or by the bare command of her husband, * * * she is punishable as if she were sole."[20] And if he were absent at the com-

19—See *ante*, sec. 76.

20—Russell on Crimes, p. 32-33; **State v. McAfoo, 110 Mo. 7, 33 Am. St. Rep. 414;** Seiler v. People, 77 N. Y. 411; Goldstein v. People, 82 N. Y. 231; People v. Ryland, 97 N. Y. 127; State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422; State v. Williams, 65 N. C. 398; Tabler v. State, 34 Ohio St. 127; Uhl v. Commonwealth, 6 Gratt. (Va.) 706; People v. Wright, 38 Mich. 744, 31 Am. Rep. 331; State v. Miller, 162 Mo. 253, 85 Am. St. Rep. 498; Nolan v. Traber, 49 Md. 460, 33 Am. Rep. 277; and see the full note as to the criminal responsibility of a married woman in 4 A. L. R. 266-283.

"The presumption of law that the wife committed an offense by the coercion of the husband when he was present is very slight, and may be rebutted by very slight circumstances." State v. Cleaves, *supra*. But see Commonwealth v. Neal, 10 Mass. 152, 6 Am. Dec. 105, in which a finding by the jury that the female defendant committed assault and battery "in company with and commanded by her husband" entitled her to acquittal. And in State v. Houston, 29 S. C. 108, a charge that "if upon the evidence it clearly appear that the wife was drawn into the offense by her husband, but was the more active of the two, she is guilty," was disapproved, the Supreme Court saying: "The question should still depend on the cause of her increased activity, and not upon the fact of such activity. The presence and con-

mission of the crime, there is no presumption of coercion, and (as in the case of a tort) she would not be excused by his previous command.[21]

In the case of the greater crimes, especially treason and murder, it has commonly been held that the husband's coercion was no excuse to the wife.[22] And in such crimes as the keeping of a house of prostitution, where from the nature of the offense the wife is likely to be the principal offender, the doctrine of presumed coercion does not apply.[23]

straint of her husband may still be the cause, and not her own wickedness. The judge held, as matter of law, that the fact of her having been the most active evidenced guilt. This we think was error."

The New Jersey court has extended the immunity of the wife still more widely, holding the law in relation to her crimes to be the same as that relating to her torts. State v. Martini, 80 N. J. L. 685.

21—Com. v. Flaherty, 140 Mass. 454; Com. v. Strangford, 112 Mass. 287; Com. v. Welch, 97 Mass. 592; Com. v. Feeney, 13 Allen (Mass.) 560; Com. v. Butler, 1 Allen (Mass.) 4; Com. v. Murphy, 2 Gray (Mass.) 510; State v. Pattee, 42 Vt. 495; State v. Shee, 13 R. I. 535.

"If the husband is near enough for the wife to act under his immediate influence and control, though not in the same room, he is not absent within the meaning of the law." Com. v. Flaherty, *ut supra;* Handy v. Foley, 121 Mass. 259, 23 Am. Rep. 270; Com. v. Strangford, 112 Mass. 287; Com. v. Burk, 11 Gray (Mass.) 437; Com. v. Daley, 148 Mass. 11. But see State v. Shee, 13 R. I. 535.

22—1 Bl. Com. 444, 4 *idem* 28-29; Schouler on Dom. Rel., § 50; Miller v. State, 25 Wisc. 384; Bibb v. State, 94 Ala. 31, 33 Am. St. Rep. 88; State v. Barnes, 48 La. Ann. 460. Blackstone (Vol. IV, p. 28) states the exception as applying to those crimes which are forbidden by the law of nature, and *mala in se;* this vague definition has been sometimes repeated (see Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105), but seldom or never applied.

23—"A wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy house, for this is an offense as to the government of the house, in which the wife has a principal share, and also such an offense as may generally be presumed to be managed by the intrigues of her sex." 1 Hawkins, Pleas of the Crown, c. 1, sec. 12. Com. v. Lewis, 1 Metc. (Mass.) 151; Com. v. Tryon, 99 Mass. 442; State v. Bentz, 11

For a crime committed by the wife, and for which she is not excused by the above considerations, she may be prosecuted like any other offender; alone if she were the sole offender, jointly with her husband or any other co-offender if it were a joint crime; the special rules applying to suits against married women have no application to criminal prosecutions.

§ 87. **To act as agent, donee of a power, or trustee.** The disability of the wife to act concerning her own affairs does not prevent her acting in a representative or fiduciary capacity. She may therefore be appointed and act as agent for her husband, [24] or for other persons,[25] and she may execute a power conferred upon her by deed or will.[26] And

Mo. 27; State v. Jones, 53 W. Va. 613. But see Com. v. Hopkins, 133 Mass. 381, 43 Am. Rep. 527.

24—**Benjamin v. Benjamin, 15 Conn. 347, 354, 39 Am. Dec. 384;** Fenner v. Lewis, 10 Johns. (N. Y.) 38; Hopkins v. Mollinieux, 4 Wend. (N. Y.) 465; Edgerton v. Thomas, 9 N. Y. 40; Steffens v. Nelson, 94 Minn. 365; Sibley v. Gilmer, 124 N. C. 635; Weisbrod v. Chicago & N. R. Co., 18 Wis. 40, 86 Am. Dec. 743; Evans v. Crawford Ins. Co., 130 Wis. 189, 118 Am. St. Rep. 1009, 9 L. R. A. (N. S.) 485; Filker v. Emerson, 16 Vt. 653, 42 Am. Dec. 532.

"The husband may make the wife his attorney; and as his attorney she may execute a deed in his name and may put his seal to it; and may before a magistrate acknowledge it to be his deed, and he shall be bound by it as effectually as by a deed executed personally by himself." Fowler v. Shearer, 7 Mass. 14.

It is evident that the entire doctrine of the husband's liability for household purchases made by the wife assumes her power to act as his agent, and that the innumerable cases defining and applying that doctrine affirm her power.

25—Pullam v. State, 78 Ala. 31.

26—2 Kent's Com. 170, 4 Kent's Com. 325; Peacock v. Monk, 2 Ves. 190; **Armstrong v. Kerns, 61 Md. 364;** Young v. Sheldon, 139 Ala. 444, 101 Am. St. Rep. 44; Thompson v. Murray, 2 Hill Ch. (S. C.) 204, 29 Am. Dec. 68; New v. Potts, 55 Ga. 420; Ladd v. Ladd, 8 How. (U. S.) 10; Wright v. Tallmadge, 15 N. Y. 307 (resting chiefly on the terms of a statute); Cranston v. Crane, 97 Mass. 459, 93 Am. Dec. 106.

Her deed given in the execution of the power does not require the concurrence of the husband. 4 Kent's Com. 325; Cranston v. Crane, *supra;* Young v. Sheldon, *supra;* Armstrong v. Kerns, *supra.*

the same principle makes it competent for her to be appointed and act as executor,[27] administrator,[28] or guardian;[29] though, under the common law theory of her subordination to the husband, his consent was necessary to her acceptance of any such trust.[30]

It would have been abhorent to common law ideas to admit any woman, and *a fortiori* a married woman, to the bar as an attorney or barrister; but under modern statutes, and with the general change of opinion in relation to women's rights and powers, even married women are in most of our states now eligible for admission to the bar.[31]

It is therefore possible for a married woman to convey, either before marriage or by the statutory or customary mode of conveyance after marriage, her real estate to trustees for uses to be afterward declared by herself by deed or will, and thus confer on herself the power of disposition by virtue of the trust. Wright v. Tallmadge, *supra;* Osgood v. Bliss, 141 Mass. 474, 55 Am. Rep. 488.

27—Re Stewart, 56 Me. 300; Lippincott v. Wikoff, 54 N. J. Eq. 107; Binnerman v. Weaver, 8 Md. 517. One evident difficulty in approving the appointment of a married woman as executor (and this consideration applies equally to the other probate trusts mentioned in the following notes) is that our probate practice requires the giving of a bond, and that the married woman at common law had no contractual power to enter into such bond. Hammond v. Wood, 15 R. I. 566.

28—Re Gyger's Estate, 65 Pa. St. 311; Binnerman v. Weaver, 8 Md. 517; English v. McNair, 34 Ala. 40. The statutes of New York on this subject are reviewed in Re Curser, 89 N. Y. 401.

29—See *post*, § 150, and note 49.

30—Lippincott v. Wikoff, 54 N. J. Eq. 107; Re Gyger's Estate, 65 Pa. St. 311; Palmer v. Oakley, 2 Douglas (Mich.) 433, 7 Am. Dec. 41; Re Stewart, 56 Me. 300; English v. McNair, 34 Ala. 40.

It was held in Allen v. McCullough, 2 Heisk. (Tenn.) 174, that the husband, by his permitting the wife to continue as guardian after the marriage, becomes responsible both during and after the marriage for whatever sums she may have received; while in Phillips v. Richardson, 4 J. J. Marsh. (Ky.), 212, his liability continued during the marriage only, being treated as similar to his liability for her antenuptial debts.

31—See the full and interesting discussion of this question as affecting women generally, and incidentally married women, in Re Rucker, 66 N. H. 207, 24 L. R. A. 740.

§ 88. **To sue and be sued.** The disabilities of married women to sue and be sued at common law were partly a matter of substantive law, based upon her inability to make any contract or hold any property outside of the control of her husband; so that she could hardly have an independent cause of action or be subject to an independent liability. But, apart from these considerations, and in cases to which they did not apply, as in case of a tort to the person, she could never, at common law, sue or be sued alone.[32] The only question that could arise was whether the husband should sue or be sued alone, or she could unite with him in the suit or be joined with him as a co-defendant.

§ 89. *A. As to suits by husband and wife.* The general rule as to the joinder of the wife with her husband as party plaintiff was that, if the cause of action survived to her in case of her husband's death, she could be joined as party plaintiff; otherwise the husband should sue alone. Applying this test to the several causes of action, it is evident that she could not join in a suit for injury to personal property, since by the marriage she wholly lost her interest in the personal property then belonging to her, and her capacity to afterward acquire personal property as her own. But an injury to her real estate gave her a right of action not merged in that of the husband, since of the real estate she owned the fee, subject to his interest during the marriage or by curtesy; choses in action reverted to her

32—Hatchett v. Baddeley, 2 Wm. Bl. 1079; Lean v. Schultz, 2 Wm. Bl. 1195; Marshall v. Rutton, 8 Durnf. & East (T. R.) 545; Beard v. Webb, 2 Bos. & Pul. 93; Stevens v. Friedman, 58 W. Va. 78, 82; Porter v. Bank of Rutland, 19 Vt. 410. And if she brings a suit while sole, and then marries, defendant may plead her coverture in abatement. Guphill v. Isbell, 1 Bailey L. (S. C.) 369; Gerard v. Pierce, 5 N. C. 161.

The exceptions, when the husband is banished, or permanently residing abroad, are stated in Barber v. Barber, 21 How. (U. S.) 582, 589. See, also, *ante*, this chapter, note 9.

on the husband's death if not reduced to possession by him during the marriage; and her person certainly remained to her as her own after the termination of her marital status. In these three cases then she might be joined with her husband: in suits affecting not merely the possession, but the fee, of her real estate;[33] on choses in action owned by her before, or accruing to her during, the marriage;[34] for personal injuries.

33—In an action of ejectment to recover the real property, or of waste for diminution of the value of the realty, she must be joined; the right in these cases being closely identified with the real estate of which she still owned the fee. **Smith v. Fitzgerald, 59 Vt. 451;** Thacher v. Phinney, 7 Allen (Mass.) 146; Babb v. Perley, 1 Me. 6; Watson v. Watson, 10 Conn. 88.

But an action for injuries to the possession, as for trespass *quare clausum fregit* or for obstructing a right of way, which accrued during the marriage, was regarded in the light of a post-nuptial chose in action, and might be brought either by the husband alone or by the husband and wife jointly. Clapp v. Stoughton, 10 Pick. (Mass.) 463; Allen v. Kingsbury, 16 Pick. (Mass.) 235; Cushing v. Adams, 18 Pick. (Mass.) 110; Adams v. Barrey, 10 Gray (Mass.) 361; Thacher v. Phinney, 7 Allen (Mass.) 146; Smith v. Fitzgerald, 59 Vt. 451; Tallmadge v. Grannis, 20 Conn. 296; Taylor v. Knapp, 25 Conn. 510.

34—For such choses as accrued to the wife during the marriage, the rule seems to be, as stated in the preceding note, that the husband had the option to sue alone or to join his wife. Since they became his upon his reducing them to his own possession, he may begin such process of reduction by suit in his own name, and on recovery of the judgment the recovery will be complete; if, on the other hand, he begins suit in the joint names, he waives his right of reduction, and by his own act continues her right of survivorship. "The recovery of judgment in such a case operates as a contingent gift from the husband to the wife, to take effect if she survives." Clapp v. Stoughton, 10 Pick. (Mass.) 463, 469; Sutton v. Warren, 10 Met. (Mass.) 451; Morris v. Booth, 8 Ala. 907; Decker v. Livingston, 15 Johns. (N. Y.) 479; Gay v. Rogers, 18 Vt. 342; Baird v. Fletcher, 50 Vt. 603; Fightmaster v. Beardsley, 1 J. J. Marsh (Ky.) 606.

The same argument would apparently apply with equal force to choses owned by the wife before marriage; but in this case, as she had an interest antecedent to and independent of that of the husband, the rule seems to be uniform that she must be joined with him in the suit. Smith v. Fitzgerald, 59 Vt. 451; Fightmaster v. Beardsley, 1 J. J. Marsh (Ky.)

In the joint suit for personal injuries she could recover only for the direct injuries to her person; for the pain and suffering caused thereby, and for the permanent disability, if any. The expenses of her illness were presumably borne by the husband, and the loss of her services, society and domestic labor, was also his chose of action and not hers, and therefore must be sued for by him alone; so that the obtaining of full damages for an injury to a wife could only be had by bringing two suits, one by the husband and wife as co-plaintiffs; the other by the husband alone [35]

§ 90. *B. As to suits against husband and wife.* The

606; Weagle v. Hensley, 5 J. J. Marsh. (Ky.) 378; Brown v. Fifield, 4 Mich. 322; Wade v. Grimes, 7 How. (Miss.) 425; Morse v. Earl, 13 Wend. (N. Y.) 271; Young v. Bennett, 5 Harr. (Del.) 365; Decker v. Livingston, 13 Johns. (N. Y.) 479.

35—**Ohio R. Co. v. Cosby, 107 Ind. 32**; Matthews v. Central Pac. R. Co., 63 Cal. 450; Tell v. Gibson, 66 Cal. 247; Fuller v. Naugatuck R. R. Co., 21 Conn. 557; Ballard v. Russell, 33 Me. 196, 54 Am. Dec. 620; R. R. Co. v. Mills, 61 Md. 355; Barnes v. Hurd, 11 Mass. 59; Filer v. N. Y. Central R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Ackerman v. N. J. R. Co., 65 N. J. L. 369; King v. Thompson, 87 Pa. St. 365, 30 Am. Rep. 364; Harper v. Pinkston, 112 N. C. 293; Whitcomb v. Barre, 37 Vt. 148; Shanahan v. Madison, 57 Wis. 276. As to the effect of the modern altered status of married women upon this secondary right of the husband, see *ante*, § 62.

Applying this rule to a case of slander, it was held in Beach v. Ranney, 2 Hill (N. Y.) 309, that for a slander which is actionable *per se*, in which damages to the feelings and good name only are recoverable, the wife should be joined; but that for words slanderous only on proof of special pecuniary damage, the husband should sue alone. With this agrees Johnson v. Dicken, 25 Mo. 580.

By the Pennsylvania statute husband and wife are permitted to recover their different amounts of damages by a double verdict rendered in the same suit; thus preserving the separation of suits in substance, but combining them in form. Stenden v. Pa. R. Co., 214 Pa. St. 189, 6 Ann. Cas. 408.

Though the wife finally died of the injury, and therefore no action for the principal cause of action can be sustained except by statute (see *post*, sec. 137) the husband can recover for the cost of medical treatment before her death. Sherlag v. Kelly, 200 Mass. 232, 128 Am. St. Rep. 414, 19 L. R. A. (N. S.) 633.

principle here was substantially the same as in regard to suits *by* husband and wife; if the liability survived against the wife in the event of her husband's death, she might be joined as a defendant in the suit. She was joined with him as defendant, therefore, in suits relating to her real estate;[36] on liabilities to which she was subject before the marriage;[37] and for torts which she committed during the marriage, not under the coercion of her husband.[38]

Three processes have co-operated to extend the capacity of married women to sue and be sued; the first is the establishment of the equitable doctrine of her sole and separate estate, as to which she could sue and be sued, *in the equity courts only,* as a single woman;[39] the second is the general extension by modern statutes of her property rights. By these statutes all her property has become sole and separate estate, in relation to which she can sue or be sued in equity, and she has acquired the capacity to make contracts, from which her right to sue, and her liability to be sued follow as matter of course.[40] The third factor in the process is the code system of practice and

36—Arbuckle v. Walker, 63 Vt. 34; Stewart v. Patrick, 68 N. Y. 450; Bushong v. Rector, 32 W. Va. 311, 25 Am. St. Rep. 817; Hodson v. Van Fossen, 26 Mich. 68.

37—Cole v. Shurtleff, 41 Vt. 311, 98 Am. Dec. 587; Cole v. Seeley, 25 Vt. 220, 60 Am. Dec. 258; Platner v. Patchen, 19 Wisc. 333; Cannon v. Grantham, 45 Miss. 94; McMahon v. Perkins, 22 R. I. 116; Parker v. Stead, 1 Lea (Tenn.) 206; Coles v. Hurt, 75 Va. 380; Gage v. Reed, 15 Johns. (N. Y.) 403.

38—2 Kent's Com. 149; Kosminsky v. Goldberg, 44 Ark. 402; Heckle v. Lurvey, 101 Mass. 344, 3 Am. Rep. 366; Franklin's Ap. 115 Pa. St. 534, 2 Am. St. Rep. 583; Baker v. Braslin, 16 R. I. 635, 6 L. R. A. 718; Brown v. Kemper, 27 Md. 666; Carleton v. Haywood, 49 N. H. 314; Baker v. Young, 44 Ill. 42, 92 Am. Dec. 149; Marshall v. Oakes, 51 Me. 308. And this rule is not altered by a statute providing that "A married woman may in all cases sue and be sued without joining her husband with her, except in cases where the cause of action exists in favor of, or against, both." McElfresh v. Kirkendall, 36 Iowa 224. See Marcus v. Rovinsky, 95 Me. 106.

39—See *post,* ch. XV.

40—See *post,* ch. XVI.

pleading, by which, in most states, legal and equitable actions have become fused. By the codes the wife's rights and liabilities, formerly recognized in equity only, are enforceable in the code civil action.[41] In many states, also, the statutes have directly conferred on the wife the right to sue and be sued. The extent to which these several facts have altered the law in this respect differs very widely in different states. In many of the most progressive states, she is now as free to sue any person, or to be sued by him, as is her husband; and he need not be joined with her in the suit, either as plaintiff or as defendant.

The right of suit between husband and wife will be discussed in the next chapter.

41—The line of argument which has been taken in such cases as Wright v. Wright, 54 N. Y. 437, and Mathewson v. Mathewson, 79 Conn. 23, 5 L. R. A. (N. S.) 611, 6 Ann. Cas. 1027, in which the right of husband and wife to sue each other, for the enforcement of ordinary property and contract rights, has been deduced from the general alteration in the status and capacity of married women, applies *a fortiori* to support suits between the wife and third persons. See other cases similar to the above, *post*, § 99, notes 50-52.

CHAPTER XIII

CONTRACTS, COMMUNITY OF PROPERTY INTERESTS, AND SUITS BETWEEN HUSBAND AND WIFE.

§ 91. Antenuptial contracts. A contract between a betrothed couple as to their future property rights was not within the technical objection applying to contracts between those who had become one person in law by marriage; and yet it is evident that peculiar considerations of equity apply to dealings between persons in such a situation, and that the law might naturally regard with some jealousy private stipulations by which the property relations of husband and wife, as defined by the general law, would be to a greater or less extent altered. The common law rule was that such contracts were void as to all rights to accrue during the marriage; but valid as to rights which were to take effect only after the marriage is over.[1] The first part

1—Page v. Acton, 1 Ld. Raymd. 515, 12 Mod. 288; Milbourn v. Ewert, 5 Durnf. & East (T. R.) 381; Brown v. Slater, 16 Conn. 192, 41 Am. Dec. 136; Miller v. Goodwin, 8 Gray (Mass.) 542; Sullings v. Richmond, 5 Allen (Mass.) 187, 81 Am. Dec. 742; Re Callister's Estate, 153 N. Y. 294, 60 Am. St. Rep. 620; Peck v. Vandemark, 99 N. Y. 29. But where an intending husband agreed that the wife should have an annuity of four hundred dollars after his death, and she acepted his convenant in satisfaction and lieu of dower, it was held that her covenant was not extinguished by the marriage, but that, if the annuity had never been settled upon her, her release of dower is without consideration and will not be enforced. Gibson v. Gibson, 15 Mass. 106, 8 Am. Dec. 94.

It is believed that the text states the true doctrine of the common law concerning ante nuptial agreements, and the distinction between the legal and equitable rules; but the common law relation has been so modified and obscured by statutes and by equitable doctrines that many of the cases ignore the distinction between agreements to be effective

of this rule inevitably results from the doctrine already stated, that the husband had the right to reduce to his own possession the wife's choses in action; this would confer upon him the control and beneficial title in any right of action which she might have against him under the antenuptial agreement, and therefore nullify it. As to the second part of the rule: the betrothed couple might make a valid agreement to affect their succession to each other's property after death, as that the wife should receive some other estate in lieu of dower,[2] that she should not claim her statutory share in his estate, or have her allowance for support.[3]

But such an agreement is open to very great suspicion, and will not be enforced unless it was fair and reasonable to the wife; and not usually unless there was a reasonable provision or settlement made upon her in lieu of the rights which she relinquished, or unless the husband relinquished rights in her estate which made a fair consideration. "The rule undoubtedly is that every presumption is against the validity of the contract, and the burden of proof is upon the husband, or those who represent him, to uphold and enforce the same."[4] In equity, the above stated distinction

during the coverture, and those to take effect after its dissolution, and put the validity of all such agreements on their fairness and the good faith with which they were made, whether the question be raised in a legal or in an equitable action.

2—See *post*, § 106.

3—Staub's Appeal, 66 Conn. 127; Paine v. Hollister, 139 Mass. 144; Buffington v. Buffington, 151 Ind. 200; Appleby v. Appleby, 100 Minn. 408, 117 Am. St. Rep. 709, 10 L. R. A. (N. S.) 590, 10 Ann. Cas. 563; Cummings v. Cummings, 25 R. I. 528; Deller v. Deller, 141 Wis. 255, 25 L. R. A. (N. S.) 751. *Contra*, Sullings v. Richmond, 5 Allen (Mass.) 187, 81 Am. Dec. 742; Johnson v. Johnson, 154 Iowa 118, 37 L. R. A. (N. S.) 875.

4—**Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22 and note;** Andrews v. Andrews, 8 Conn. 79, 85; Warner's Appeal, 210 Pa. St. 431; Gilmore v. Gilmore, 7 Ore. 374, 33 Am. Rep. 710; Achilles v. Achilles, 152 Ill. 136. A charge that "the woman was bound to exercise her judgment and take advantage of the opportunities that existed to obtain information; if she did not do so, it was

between agreements to take effect during the coverture, and those which are to take effect only after its termination, is disregarded, and antenuptial agreements of a fair and reasonable character, where no imposition has been practiced, are freely enforced.[5]

her own fault; the parties were dealing at arm's length," was held erroneous. Kline v. Kline, 57 Pa. St. 120.

5—Schouler on Dom. Rel., § 173; 2 Kent's Com. 165; **McNutt v. McNutt, 116 Ind. 545, 2 L. R. A. 372;** Andrews v. Andrews, 8 Conn. 79; Baldwin v. Carter, 17 Conn. 201, 208, 42 Am. Dec. 735; Murdock v. Murdock, 219 Ill. 123; Sullings v. Sullings, 9 Allen (Mass.) 234; Tarbell v. Tarbell, 10 Allen (Mass.) 278; Paine v. Hollister, 139 Mass. 144; Neely's Appeal, 124 Pa. St. 406, 10 Am. St. Rep. 594; Robinson's Appeal, 222 Pa. St. 115; Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702; Mintier v. Mintier, 28 Ohio St. 507; Desnoyer v. Jordan, 27 Minn. 295; Chaffee v. Chaffee, 70 Vt. 231; Gelzer v. Gelzer, Bailey's Eq. (S. C.) 387, 23 Am. Dec. 180; Brooks v. Austin, 95 N. C. 474.

In Stratton v. Wilson, 170 Ky. 61, Ann. Cas. 1918 B 917, it is held that the wife must have been fully informed as to the amount of the husband's estate to support a contract by which she accepted a small amount in lieu of her marital rights; but that if she was so informed before the marriage, though after the signing of the contract, she cannot repudiate it.

In Neely's Appeal, *supra*, the court spoke as follows about the equitable considerations applicable to the marriage of mature persons; "There is a marked distinction between this case and that of a young couple just entering upon the voyage of life. In the latter instance they grow up together; the wife is the mother of his children; she shares his burdens in his early struggles, and often by her thrift and economy materially aids him in the accumulations of his fortune. To cut off such a wife with a mere support during life would be as unjust as it would be ungenerous. But when a man in the decline of life, who has been twice a widower, who has two sets of children, for the third time leads a woman to the altar, and an elderly woman at that, it is very different. In such case the wife reaps where she has not sown, and if she is provided with a comfortable support after her husband's death she has no just cause of complaint. In any event, if she is dissatisfied, she ought to refuse to sign the contract, and not accept its benefits during her husband's life, and then seek to repudiate it after his death." See the similar suggestion in Andrews v. Andrews, 8 Conn. 79.

In Lukens's Appeal, 143 Pa. St. 386, 24 Am. St. Rep. 557, 13 L. R. A. 581, a wife who had made an antenuptial agreement for the re-

An important and frequent class of contracts has thus grown up, known as "Marriage Settlements," by which parties intending marriage agree to settle their property rights and relations on a different basis from that provided by the general law. Such contracts, if fairly made, are viewed with favor rather than with disfavor by the courts.[6] The marriage itself is a sufficient consideration to support the agreements contained therein; and this is so although a valid engagement of marriage may have been entered into by the parties before the antenuptial agreement was made.[7]

lease of all claims upon the husband's estate upon considerations that the court held to be fair, becoming discontented with the agreement, separated from her husband, and returned to him only on his agreement to revoke the antenuptial agreement. Held, that this revocation was procured by such abuse of the marital relation as would make it against public policy to enforce it. The wife was therefore held bound by her release.

In Taylor v. Richman, 1 N. C. 278, and Rockafellow v. Newcomb, 57 Ill. 186, conveyances given by the man in anticipation of marriage were set aside as procured by undue influence and imposition. In the latter case the woman after obtaining the conveyance refused to marry the man. The court observed: "This man, with his fervid passion and strong love, was not well matched against an accomplished woman in the incipent stages of their engagement. * * * A woman can always exercise an undue influence over the man she professes to love." It is hardly necessary to say that in the great majority of cases it is the woman who has been held to be overreached.

In Hudnall v. Ham, 183 Ill. 486, 75 Am. St. Rep. 124, 48 L. R. A. 557, a husband and wife had made a fair and well-considered antenuptial contract, by which an existing will of the husband in favor of third persons was to have full effect, the wife relinquishing all right adverse to it. The will having been, as matter of law, revoked by the marriage, it was held that the antenuptial agreement, and the will as a part of it, would be enforced against the wife as an equitable assignment. Lant's Appeal, 95 Pa. St. 279, 40 Am. Rep. 646, is very similar, a like contract being enforced against the surviving husband. See also Osgood v. Bliss, 141 Mass. 474, 55 Am. Rep. 488.

6—**Appleby v. Appleby, 100 Minn. 408, 117 Am. St. Rep. 709, 10 L. R. A. (N. S.) 590, 10 Ann. Cas. 563;** McNutt v. McNutt, 116 Ind. 545, 2 L. R. A. 372; Hafer v. Hafer, 33 Kan. 449; Forwood v. Forwood, 86 Ky. 114; Achilles v. Achilles, 151 Ill. 136.

7—Appleby v. Appleby, *supra;*

By such marriage settlements it is often agreed that the property owned by the wife before coverture shall continue to be her own, free from any title or control in the husband, powers are often granted to or reserved by the wife to deal with her property as a feme sole, and to execute conveyances thereof, and property of the husband may be settled upon her as her sole and separate estate. In this way the wife may have property not within the general marriage law; and at an early time the courts of equity recognized such "sole and separate estate" of married women, as to which the owner was regarded as a single woman, with all the powers which a single woman has. This topic will be more fully considered in a subsequent chapter.[8]

§ 92. **Postnuptial contracts of an executory nature.** It results from the general theory of the unity of husband and wife at the common law that no executory contract can be made between them during the marriage. Thus, if they agree to form a partnership, it is not binding upon the wife, and she can not be held liable as a partner by creditors of

McNutt v. McNutt, *supra;* Hafer v. Hafer, *supra;* Forwood v. Forwood, *supra;* Barnum v. LeMaster, 110 Tenn. 638; Cole v. Am. Baptist Home Missionary Society, 64 N. H. 445; Fisher v. Koontz, 110 Iowa 498.

In Borgess v. Richards, 39 W. Va. 567, 45 Am. St. Rep. 938, 26 L. R. A. 537, a case where an antenuptial contract was attacked by creditors as in fraud of their rights, the court said: "The contract in this case was not only on consideration deemed valuable in law, but on the highest consideration known to the law, to wit, marriage."

Spurlock v. Brown, 91 Tenn. 241, contains an interesting discussion of the different value given by different courts to the marriage itself as a consideration; the court concluding that if the contract was in fact given for the consideration of the marriage, that would be a sufficient consideration to support it; but that if the contract purported to be in consideration of mutual pecuniary benefits, and it appeared that the wife released valuable rights in ignorance of the fact that her personal property would pass to the husband by the marriage, the contract would not be enforced against her.

8—See *post*, ch. XV.

the firm.[9] And if either husband or wife gives the other a promissory note it is void, though endorsed over to an innocent holder who did not know of the relation between maker and payee.[10] But in equity contracts between husband and wife have been recognized and enforced from an early time, the same conditions being imposed, and the same caution exercised, as in the case of antenuptial contracts discussed in the preceding section.

"The unity of husband and wife, by which the legal existence of the wife was merged with that of her husband, preventing them from contracting with each other as if they were two distinct persons, never prevailed in courts of equity. It may be more accurate to say that courts of

9—Barlow v. Parsons, 73 Conn. 696.

And statutes giving the wife general contractual powers have often been held not to authorize a partnership between husband and wife. Lord v. Parker, 3 Allen (Mass.) 127; Haggett v. Hurley, 91 Me. 442, 41 L. R. A. 362; Gilkersin v. Sallinger, 56 Ark. 294, 35 Am. St. Rep. 105, 16 L. R. A. 526; Haas v. Shaw, 91 Ind. 384, 46 Am. Rep. 607; Artman v. Ferguson, 73 Mich. 146, 16 Am. St. Rep. 572, 2 L. R. A. 343; Board of Trade v. Hayden, 4 Wash. 263, 31 Am. St. Rep. 919, 16 L. R. A. 530; Fuller v. McHenry, 83 Wisc. 573, 18 L. R. A. 512.

In other states the statutes are differently construed so as to permit partnerships between a man and wife. **Hoaglin v. Henderson, 119 Iowa 720, 61 L. R. A. 756, 97 Am. St. Rep. 335;** Noel v. Kinney, 106 N. Y. 74, 60 Am. Rep. 423; Suau v. Caffe, 122 N. Y. 308, 9 L. R. A. 593; Lane v. Bishop, 65 Vt. 575; Burney v. Savannah Grocery Co., 98 Ga. 711, 58 Am. St. Rep. 342; Morrison v. Dickey, 122 Ga. 353, 69 L. R. A. 87.

10—**Nat. Granite Bank v. Wicher, 173 Mass. 517, 73 Am. St. Rep. 317;** Roby v. Phelan, 118 Mass. 541; Nat. Granite Bank v. Tyndale, 176 Mass. 547, 51 L. R. A. 447; Ellsworth v. Hopkins, 58 Vt. 705; Hoker v. Boggs, 63 Ill. 161. This rule invalidates a note given to a wife by a firm of which the husband is a member; Clark v. Patterson, 158 Mass. 388, 35 Am. St. Rep. 498; or a loan made by her to such a firm; Fowle v. Torrey, 135 Mass. 87.

But if the note was made by the husband to a third person and immediately indorsed to the wife, it is a valid chose of action in her hands which she can collect from his estate, though the third person had no interest, and was used as payee merely to avoid the objection arising from the coverture. Spooner v. Spooner, 155 Mass. 52.

equity disregard the fiction upon which the common law proceeded, and are accustomed to lay hold of and give effect to transactions or agreements between husband and wife, according to the nature and equity of the case. It does not limit its inquiry to the ascertainment of the fact whether what had taken place would, as between other persons, have constituted a contract, and give relief as matter of course if a formal contract be established, but it further inquires whether the contract was just and fair, and equitably ought to be enforced, and administers relief where both the contract and the circumstances require it."[11] The wife's con-

11—**Hendricks v. Isaacs, 117 N. Y. 411, 15 Am. St. Rep. 524, 6 L. R. A. 559;** Boland v. O'Neil, 72 Conn. 217; Wallingsford v. Allen, 10 Pet. (U. S.) 583, 594; Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726; Haussman v. Burnham, 59 Conn. 117, 21 Am. St. Rep. 74; DeRuiter v. DeRuiter, 29 Ind. Ap. 9, 91 Am. St. Rep. 106; Munday v. Cillier, 52 Ark. 126; Morrison v. Thistle, 67 Mo. 596; Kimball v. Kimball, 75 N. H. 291; Buttlar v. Buttlar, 71 N. J. Eq. 671; Sims v. Ricketts, 35 Ind. 181, 9 Am. Rep. 679; Bowie v. Stonestreet, 6 Md. 418, 61 Am. Dec. 318; Hinkle v. Hinkle, 34 W. Va. 142.

But in Massachusetts the courts hold the contract unenforceable in equity as well as at law. Fowle v. Torrey, 135 Mass. 87; Clark v. Patterson, 158 Mass. 388, 35 Am. St. Rep. 498; Nat. Granite Bank v. Tyndale, 176 Mass. 547, 51 L. R. A. 447.

The rigidity of the Massachusetts rule is shown by the ruling that a wife cannot be an "employee" of her husband under the Workmen's Compensation Act, though she was in fact working in his factory for wages. Humphrey v. Employers Liability Asso., 227 Mass. 166, L. R. A. 1918 F 193.

But see the dictum in Frankel v. Frankel, 173 Mass. 214, 73 Am. St. Rep. 266.

So in Michigan: Jeune v. Marble, 37 Mich. 322.

Mr. Pomeroy, in his treatise on Equity Jurisprudence, § 1121, holds that the equitable recognition of a wife's power to contract exists solely as an incident to her "sole and separate estate," and is effective only as creating a charge on such real estate. He says: "Equity has never clothed married women with the capacity to bind themselves personally by contract." It is believed that the cases cited in this note show that the doctrine is broader than is stated by Mr. Pomeroy, and extends (except in Massachusetts) to clothe her, in equity, with a general contractual power. Land v. Shipp, 98 Va. 284, 50 L. R. A. 560, holds that a married woman cannot, by post-nuptial agreement, release to her husband her right

tract with her husband will not ordinarily be enforced against her, even in equity, unless she receive an actual consideration of value or benefit to herself.

Where, however, such a contract has been partially executed, where, that is, one party has transferred property to the other on the faith of the contract, the courts of equity, even if not enforcing the contracts directly, will enforce such equities as arise from the partial performance. The courts in such a case enforce the resulting equities rather than the contract.[12]

The modern statutes which confer upon married women property rights and powers of contract often in terms confer only the power of making contracts with third persons; but even with such limitation in the express terms of the statute it has been held by the courts of some states that the statutory overthrow of the theory that husband and wife are but one person as to their property, the conferring on her of property rights which virtually make all her property "sole and separate estate," and the emancipation of wives from dependence upon and subjection to their husbands by the change in social customs as well as in law, have rendered the old legal views of postnuptial contracts obsolete, and necessitated the enforcement of agreements between husband and wife; and under the code system it is not always essential that the action should be one of a strictly equitable nature.[13] While other courts have applied

of dower; though she may be barred of dower by accepting, after her husband's death, the agreed substitute for dower. The court cite Rhodes v. Davis, 51 Mich. 306, as *contra*.

12—3 Pom. Eq. Jur. §§ 1121-1126; Kesner v. Trigg, 98 U. S. 50; Demarest v. Terhune, 62 N. J. Eq. 663; Haussman v. Burnham, 59 Conn. 117, 21 Am. St. Rep. 74; Manning v. Pippen, 86 Ala. 357, 11 Am. St. Rep. 46; Veal v. Veal, 89 Ky. 314, 25 Am. St. Rep. 534; Bowie v. Stonestreet 6 Md. 418, 61 Am. Dec. 318; Johnston v. Johnston, 173 Mo. 91, 96 Am. St. Rep. 486; Baird v. Connell, 121 Iowa 278; Burkholder's Appeal, 105 Pa. St. 31.

13—Perhaps the most thoroughgoing assertion of the revolution

the ordinary rule of construing statutes which are in derogation of the common law strictly, and have held that a wife could not make a legal contract with her husband unless the statute expressly validated such contract.[14]

§ 93. Contracts for separation or separate maintenance. One class of agreements between husband and wife require particular discussion; those, to wit, in which the marital couple agree to live separate, or agree on an adjustment of their property rights, or on the manner in which the wife's maintenance shall be furnished by the husband, in view of an existing or contemplated separation. Such agreements raise questions of public policy which have been viewed very differently by different courts; and the actual decisions are in very great confusion and contradiction.[15]

accomplished in the status of married women, which necessarily extends to them rights even beyond the express terms of the statutes, is to be found in **Mathewson v. Mathewson, 79 Conn. 23, 5 L. R. A. (N. S.) 611, 6 Ann. Cas. 1027.** See also Spitz's Appeal, 56 Conn. 184, 7 Am. St. Rep. 303; Peaks v. Hutchinson, 96 Me. 530, 59 L. R. A. 279 (but she cannot enter into a partnership with him: Haggett v. Hurley, 91 Me. 442, 41 L. R. A. 362); Rice v. Sally, 176 Mo. 107; May v. May, 9 Neb. 16, 31 Am. Rep. 399; Crum v. O'Rear, 132 Ill. 443.

In some states the statutes settle the question by expressly giving the power to husband and wife to contract together. Osborne v. Cooper, 113 Ala. 405, 59 Am. St. Rep. 117; Jones v. Chenault, 124 Ala. 610, 82 Am. St. Rep. 211; Dimond v. Sanderson, 103 Cal. 97; O'Connell v. Torrey, 16 Col. 353, 25 Am. St. Rep. 275.

As to contracts by the husband to pay the wife for services outside her domestic duties, see *ante*, § 57.

14—**Barnett v. Harshbarger, 105 Ind. 410;** Heacock v. Heacock, 108 Iowa 540, 75 Am. St. Rep. 273; Kniel v. Eggleston, 140 Mass. 202; Plaisted v. Hair, 150 Mass. 275, 5 L. R. A. 664; Atkins v. Atkins, 195 Mass. 124, 122 Am. St. Rep. 221, 11 L. R. A. (N. S.) 273; Jeune v. Marble, 37 Mich. 322; Farmer v. Farmer, 39 N. J. Eq. 211; Small v. Small, 129 Pa. St. 366. See Haggett v. Hurley, 91 Me. 442, 41 L. R. A. 362; White v. Wager, 25 N. Y. 328.

15—Chancellor Kent's views on the topic, and his discussion of the decisions down to about 1840, will be found in his text and notes, 2 Kent's Com. 176-178. See also the exceptionally valuable opinion, in which the history of the subject is carefully stated, and the cases reviewed, in Poole v. Nickerson,

It was formerly held, both in England and in the United States, that an agreement between a husband and wife to live separate, or an agreement between the husband and a trustee for the wife, who covenants that she will live apart from him, was void, as being in violation of the obligations of the marriage contract, and contrary to public policy. The ecclesiastical courts, which formerly in England had the jurisdiction over suits for divorce, for judicial separation, and for restitution of conjugal rights, and also the probate and testamentary jurisdiction, in which such agreements often became important, always maintained this view.[16] The common law and chancery courts, however, during the latter half of the eighteenth and first half of the nineteenth century, began to give a fluctuating but increasing recognition to such contracts. The transfer of divorce

70 N. H. 496, 54 L. R. A. 554.

"The question has been the subject of much litigation and with varied results. Not only do the cases in one state conflict with those in another, but in the same jurisdiction the views of one generation have often been held to be erroneous in later time. There is disagreement not only as to what the law is, but also as to the history of the law, and how it was held to be in former times. In order then to reach a satisfactory solution of the question, it is essential to examine with some minuteness the historical aspect of the law applicable to this case." Foote v. Nickerson, *ut supra*.

16—"This court considers a private separation as an illegal contract, implying a renunciation of stipulated duties, a dereliction of those mutual offices which the parties are not at liberty to desert, an assumption of a false character in both parties, contrary to the real *status personae*, and to the obligations which both of them have contracted in the sight of God and man to live together 'till death them do part,' and on which the solemnities both of civil society and of religion have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient and sufficiently proved. These courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uniformly rejected such covenants." Mortimer v. Mortimer, 2 Hagg. Consist. 310, 318.

and probate jurisdiction from the ecclesiastical courts to the king's courts by statute in 1857 made the latter doctrine dominant; and it has finally become the established law of England that an agreement between husband and wife to live separate, and that neither of them will bring an action for divorce, nor for the restitution of conjugal rights, with provisions adjusting the property rights of the parties, and providing for the maintenance of the wife in view of such separation, is valid in equity and in the probate courts, which have equitable jurisdiction, and will be enforced not only in relation to the property agreements, but also in regard to the agreement to live apart.[17]

17—Probably the most important steps in the process of change were the decisions of Corbitt v. Poelnitz, 1 Durnf. & East (T. R.) 5, decided in 1785; Wilson v. Wilson, 1 H. L. 538, 5 H. L. 40, decided in 1848 and 1854; and Besant v. Wood, 12 Ch. D. 605, decided in 1879. In Corbitt v. Poelnitz, Lord Mansfield held that a woman who was living separate from her husband, under a deed of separation, under which she had a considerable estate settled upon her, might make contracts, incur debts, and sue and be sued, in law as well as in equity. By the separation agreement she acquired practically the status of a *feme sole*, so far as her property rights were concerned. This decision, after having been several times doubted (see Ellas v. Leigh, 5 Durnf. & East (T. R.) 679; Clayton v. Adams, 6 Durnf. & East (T. R.) 604), was at length overruled in 1800 by the unanimous opinion of the judges in Marshall v. Rutton, 8 Durnf. & East (T. R.) 545. In 1835, in Warrender v. Warrender, 2 Clark & F. 488, 527, Lord Brougham, speaking for the House of Lords said: "What is the legal value or force of this kind of agreement in our law? Absolutely none whatever in any court whatever, for any purpose whatever, save and except one only, the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach; no specific performance of its articles can be decreed. No court, civil or consistorial, can take notice of its existence."

In Wilson v. Wilson, *supra*, the House of Lords decided that an agreement for separation, and an adjustment of the property rights of the parties in accordance therewith, was valid, though the question whether the provision con-

This English doctrine has never been accepted in the United States to its full extent. The decisions have been conflicting, and the deduction of any general rule of American law is very difficult; but the prevailing distinction is as follows: the contract to live separately is itself invalid and can not be enforced.[18] Fair agreements to provide for the support of the wife, or for adjustment of property rights, in view of an existing separation, will be upheld and enforced in equity. But the agreement must be

cerning the personal relations of husband and wife could be enforced by injunction was left undecided. In Besant v. Wood, *supra*, Sir George Jessel, M. R., went to the full extent of enforcing the agreement of the wife to remain away from the husband by a decree for specific performance. He said: "For a great number of years both ecclesiastical judges and lay judges thought it was something very horrible and against public policy that the husband and wife should agree to live separate, and it was supposed that a civilized country could no longer exist if such agreements were enforced by courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy; other considerations arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately, and that was the view carried out by the courts when it became once decided that separation deeds *per se* were not against public policy." This decision has ever since been the unquestioned law of England. See Kennedy v. Kennedy, (1907) P. D. 49.

But even in England an agreement to take effect upon a possible future separation is void. Westmeath v. Westmeath, 1 Dow. & Cl. 519, 541; Westmeath v. Salisbury, 5 Bligh (N. R.) 339, 367.

18—Foote v. Nickerson, 70 N. H. 496, 54 L. R. A. 554; Hill v. Hill, 74 N. H. 288, 124 Am. St. Rep. 966, 12 L. R. A. (N. S.) 848; Aspinwall v. Aspinwall, 49 N. J. Eq. 302; McKee v. Reynolds, 26 Iowa 578; McCroklin v. McCroklin, 2 B. Mon. (Ky.) 370; Melony v. Melony, cited 1 N. J. Eq. 391; McKennan v. Phillips, 6 Whart. (Pa.) 571, 37 Am. Dec. 438. But in Com. v. Richards, 131 Pa. St. 209, it was held that a wife who had made a fair settlement with her husband, under which they each agreed to live separately, could not maintain a criminal prosecution against him for abandonment of her.

in view of a separation which has already occurred, or at least of one which has been decided upon and is completed at the making of the agreement.[19] In some of the stricter decisions it is held that no contract is valid, of which an agreement to continue their separate life is the consideration or a part of the consideration.[20] In other states a more favorable view than that above stated is taken with reference to separate agreements, and the decisions approximate

19—**Walker v. Walker, 9 Wall. (U. S.) 743;** Buch v. Anthony, 109 Ga. 349, 77 Am. St. Rep. 349; Sumner v. Sumner, 121 Ga. 1; Gaines v. Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; Edleson v. Edleson, 179 Ky. 300, 2 A. L. R. 689; Carey v. Mackey, 82 Me. 516, 17 Am. St. Rep. 500, 9 L. R. A. 113; Page v. Trufant, 2 Mass. 159, 3 Am. Dec. 41; Fox v. Davis, 113 Mass. 255, 18 Am. Rep. 476; Stephenson v. Osborne, 41 Miss. 119, 90 Am. Dec. 358; Aspinwall v. Aspinwall, 49 N. J. Eq. 302; Buttlar v. Buttlar, 57 N. J. Eq. 645, 73 Am. St. Rep. 648; Galusha v. Galusha, 116 N. Y. 635, 15 Am. St. Rep. 453, 6 L. R. A. 487; Garver v. Miller, 16 Ohio St. 527; Henderson v. Henderson, 37 Ore. 141, 82 Am. St. Rep. 741, 48 L. R. A. 766; Com. v. Richards, 131 Pa. St. 209; Rains v. Wheeler, 76 Tex. 390; Swiger v. Swiger, 58 W. Va. 119; Randall v. Randall, 37 Mich. 563.

A separation agreement was held absolutely void in North Carolina. (Chambers v. Davis, 1 Phillips Eq. (N. C.) 153, 93 Am. Dec. 606); but this decision was reversed in view of the later statutes, and the more liberal rule adopted. Archbell v. Archbell, 158 N. C. 408, Ann. Cas. 1913 D 261. And in Virginia its validity in any case is left undecided, and very strict conditions imposed to any possible recognition. Switzer v. Switzer, 26 Gratt. (Va.) 574.

An agreement by a separated couple that the wife will return, the husband will pay her a weekly sum for the support of herself and the children, and in case he again misbehaves she is free to leave him with the children and he will still pay her the stipulated amount, was held valid in Terkelson v. Peterson, 216 Mass. 531.

20—Foote v. Nickerson, 70 N. H. 496, 54 L. R. A. 554; Hill v. Hill, 74 N. H. 288, 124 Am. St. Rep. 966, 12 L. R. A. (N. S.) 848; Baum v. Baum, 109 Wis. 47, 83 Am. St. Rep. 854. In Boland v. O'Neil, 72 Conn. 217, a contract following a surreptitious marriage, by which the parties agreed to live separate, the evident intention being to maintain a secret marriage relation, the husband agreeing to pay the wife $10,000, was held void as against public policy, the court taking the stricter view of the lawful scope of such agreements. Mr. Schouler, in his treatise on Domestic Relations, §§ 215, 218, strongly supports the most restrictive view.

the English doctrine,[21] though in no American court is the agreement to live separate itself enforceable. And if such an agreement is intended to facilitate a divorce, and insure against opposition being made thereto, it is void.[22]

A divorce obtained after the agreed separation does not of its own force terminate such provisions of the separation agreement as were permanent in their nature, at least as against the party in whose favor the divorce decree was rendered.[23]

In the older decisions, when the general equitable right of husband and wife to contract together was not yet firmly established, the courts required the intervention of a trustee for the wife, who became responsible for the obligations imposed upon her, and to whom the husband's covenants were made; but in view of the established equitable doctrine of the competency of husband and wife to contract together, the requirement of a trustee seems obsolete, and it is so treated in some of the cases.[24]

21—**Aspinwall v. Aspinwall, 49 N. J. Eq. 302;** Buttlar v. Buttlar, 57 N. J. Eq. 645, 73 Am. St. Rep. 648; Clark v. Fosdick, 118 N. Y. 7, 16 Am. St. Rep. 733, 6 L. R. A. 132; Duryea v. Bliven, 122 N. Y. 567; Com. v. Richards, 131 Pa. St. 209; Swiger v. Swiger, 58 W. Va. 119; Bowers v. Hutchinson, 67 Ark. 15; Walker v. Walker, 9 Wall. (U. S.) 743; Re Singer, 233 Pa. St. 55, Ann. Cas. 1913 A 1326.

22—Hood v. Roleson, 125 Ark 30, Ann. Cas. 1918 E 900 and note.

23—Carey v. Mackey, 82 Me. 516, 17 Am. St. Rep. 500, 9 L. R. A. 113; Carpenter v. Osborne, 102 N. Y. 552; Galusha v. Galusha, 116 N. Y. 635, 15 Am. St. Rep. 453, 6 L. R. A. 487; Clark v. Fosdick, 118 N. Y. 7, 16 Am. St. Rep. 733, 6 L. R. A. 132; Winn v. Sanford, 148 Mass. 39, 1 L. R. A. 512; Buttlar v. Buttlar, 71 N. J. Eq. 671; Kremelberg v. Kremelberg, 52 Md. 553.

As to the effect of a subsequent reconciliation and reunion on the property agreements, see Dennis v. Perkins, 88 Kan. 428, 43 L. R. A. (N. S.) 1219 and note.

24—Com. v. Richards, 131 Pa. St. 209; Bowers v. Hutchinson, 67 Ark. 15; Sumner v. Sumner, 121 Ga. 1; Edleson v. Edleson, 179 Ky. 300, 2 A. L. R. 689; Garver v. Miller, 16 Ohio St. 527; Daniels v. Benedict, 97 Fed. 367. The same is true in England. McGregor v. McGregor, 20 Q. B. D. 529.

§ 94. Executed contracts between husband and wife. *A. Deeds.* It has already been stated that the usage became early established in the United States, taking the place of the English conveyance by fine or common recovery, that a married woman might convey her land by deed executed by her husband jointly with herself.[25] But evidently a deed in which the husband was required to be a grantor could not be made to him as grantee, nor did the doctrine of the unity of the person permit the husband to make a deed to his wife. Deeds between husband and wife were, therefore, void at law. Equity however enforced such deeds; or, more accurately, it enforced the equities evidenced by or growing out of them. Thus if the husband conveyed land to the wife for a fair consideration,[26] or even without consideration, if his circumstances made the gift a natural and proper one,[27] though no legal title passed by the deed, the courts of equity considered him as holding the title as trustee for the wife, and compelled him to execute the trust for her benefit. And even the wife's deed to the husband was enforced against her in equity, if it was given fairly and upon valuable consideration,[28] though a

25—See *ante*, § 83.

26—Ogden v. Ogden, 60 Ark. 70, 46 Am. St. Rep. 151; Sims v. Ricketts, 35 Ind. 181, 9 Am. Rep. 679; Wilder v. Brooks, 10 Minn. 50, 88 Am. Dec. 49; Turner v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319; Furrow v. Athey, 21 Neb. 671, 59 Am. Rep. 867; Chadbourne v. Gilman, 64 N. H. 353; Dean v. Met. El. R. Co., 119 N. Y. 540.

27—**Hunt v. Johnson, 44 N. Y. 27, 4 Am. Rep. 631;** Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57, 11 Am. Dec. 396; Sims v. Ricketts, 35 Ind. 181, 9 Am. Rep. 679; Jones v. Clifton, 101 U. S. 225; Moore v. Page, 111 U. S. 117; Wilder v. Brooks, 10 Minn. 50, 88 Am. Dec. 49; Turner v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319.

But it was held in Fowler v. Trebein, 16 Ohio St. 493, 91 Am. Dec. 95, that a deed direct from husband to wife, without consideration, was void both at law and in equity, even as between the parties and without regard to its effect on the rights of creditors.

28—Winans v. Peebles, 32 N. Y. 423; Grain v. Shipman, 45 Conn. 572. *Contra*, Gebb v. Rose, 40 Md. 387.

See, as to deeds from the wife, the comprehensive note to 9 Am. St. Rep. 323.

mere gift of real estate was not usually enforced against the wife.[29]

The inconvenience of the rule by which a legal title could not pass between husband and wife was so great that an evasion soon came to be commonly used and sanctioned by the courts. Either husband or wife might convey (the wife's deed having the concurrent execution of the husband) to a third party, and that third party might immediately convey to the other of the married couple; however illogical this mere circumlocution may be, it became firmly established, and is still everywhere in use,[30] except where, by statute, direct deeds between husband and wife have been made valid.[31] It makes no difference with the legality

29—Livingston v. Hall, 73 Md. 386; White v. Wager, 25 N. Y. 328; Winans v. Peebles, 32 N. Y. 423; Rico v. Brandenstein, 98 Cal. 465, 35 Am. St. Rep. 192. See also the cases cited *post*, note 33.

In Hunt v. Johnson, 44 N. Y. 27, 4 Am. Rep. 631, the New York Court of Appeals state the distinction between a deed from a wife to her husband, and one from the husband to his wife, as follows: "At law either conveyance is equally void. They do not necessarily stand upon the same basis in equity. It is the duty of the husband to provide an assured and comfortable support for his wife during his life and after his death. No duty rests upon the wife to provide for the husband. The customs of the country and the laws of the land look upon her as the party to be aided and sustained by the toil and the wealth of the husband. An application of the husband's property for her comfort is eminently equitable, and has been favored by the courts from their earliest existence. No judge has yet anounced that this equity or this favor is to be extended to gifts from the wife to the husband. There is in the nature of things a broad and palpable distinction against an equitable claim in the husband's favor."

30—Bartholomew v. Muzzy, 61 Conn. 387, 396, 29 Am. St. Rep. 206; Motte v. Alger, 15 Gray (Mass.) 322; Donahue v. Hubbard, 154 Mass. 537, 26 Am. St. Rep. 225, 14 L. R. A. 123; Scarborough v. Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; White v. Wager, 25 N. Y. 328; Dukes v. Spangler, 35 Ohio St. 119.

See the note, L. R. A. 1915 C 769.

31—Among cases recognizing direct deeds between husband and wife by virtue of statute, see Osborne v. Cooper, 113 Ala. 405, 59 Am. St. Rep. 117; O'Connell v. Taney, 16 Col. 353, 25 Am. St. Rep.

of the deed that the purpose of passing title from husband to wife by means of the double conveyance is manifest, or even is recited in the deeds. Of course the satisfying of formal requirements, and the passing of the legal title by the double conveyance, would not bar the claim that a particular conveyance was in fact fraudulent, or procured by such duress or undue influence as to justify equity in setting it aside.

§ 95. *B. Gifts.* The course of the law as to gifts between husband and wife has been similar to that relating to deeds of real estate. At common law they were wholly void. Indeed, since at the common law the wife could own no personal property, the question as to her gift could hardly arise; and a gift from husband to wife would immediately be annulled by the reversion of the title to him by his marital rights. But in equity, and by modern statutes, the right of the wife to either make or receive a gift is well established.[32] Such gifts are, however, pecu-

275; Barrows v. Barrows, 138 Ill. 649; Despain v. Wagner, 163 Ill. 598; Durdeno v. Amperse, 14 Mich. 91, 90 Am. Dec. 225.

See Dean v. Met. El. R. Co., 119 N. Y. 540; and **Alexander v. Shalala, 228 Pa. St. 297, 139 Am. St. Rep. 1004, 31 L. R. A. (N. S.) 844 and note, 20 Ann. Cas. 1330.**

32—**Moore v. Page, 111 U. S. 117;** Fisk v. Cushman, 6 Cush. (Mass.) 20, 52 Am. Dec. 761; Fritz v. Fernandez, 45 Fla. 318; Botts v. Gooch, 97 Mo. 88, 10 Am. St. Rep. 287; Johnston v. Johnston, 173 Mo. 91, 96 Am. St. Rep. 486, 61 L. R. A. 166; Farmer v. Farmer, 39 N. J. Eq. 211; Barnum v. LeMaster, 110 Tenn. 638; Fletcher v. Wakefield, 75 Vt. 257; Fox v. Jones, 1 W. Va. 205, 91 Am. Dec. 383; Cummings v. Freedman, 65 Wisc. 183, 56 Am. Rep. 628.

An early Connecticut decision, refusing to recognize a gift from husband to wife, curiously illustrates the conservative temper of the early Puritan judiciary of that state. The court said: "In tracing the history of the English chancery on this subject it is found that the doctrine of the wife's separate personal estate, a little more than a century past, since the emigration of our ancestors into this country, first insinuated itself into practice. It was not received without difficulty; but it gradually gained ground, and soon introduced the principle of contract between husband and wife. Both have advanc-

ed and been extended, till a system has grown up widely different from the principles of the ancient common law upon this point and others arising out of the marriage relation. It owes its rise to that state of manners and society which it has followed and accommodated. It is unnecessary to enter on a detail of those manners, different ranks, and general state of society in England which induced the system; they greatly differ from ours. At the time of the emigration of our ancestors from England the principles of the common law on this subject were in full force, unqualified by the modifications of the court of chancery; they have ever been received and applied in their unqualified sense, both in our courts of law and chancery. This is a case of novel impression; the maxims of the ancient common law on this subject are plain and simple; our state of manners and society do not require that they should be relaxed or qualified. The principles therefore which govern in the English courts of chancery ought not to be ingrafted into our chancery system, but those of the common law remain unimpaired." Dibble v. Hutton, 1 Day (Conn.) 221, 236, decided in 1804. Fifty-two years later the same court overruled this decision, using the following language: "We are not called upon at this time to review the entire doctrine of that case, but we are satisfied that if it is intended to assert at this day, that in equity the husband cannot give or grant unto his wife, during coverture, that which is suitable for her maintenance and comfort, where there are no creditors to be affected, the position is at variance with the entire current of authorities in England and in this country. * * * That case is an anomaly in the law; and its doctrine is not at this time, nor was it then, altogether satisfactory to the profession. And further it has been so materially encroached upon and modified by recent decisions of this court, and more especially assailed by the widespread sentiment of the community and the legislation of this and other states, that the doctrine of the case is viewed as an illiberal and obsolete relic of the ancient law of *baron* and *feme*." Riley v. Riley, 25 Conn. 154, 164. See also Deming v. Williams, 26 Conn. 226, 68 Am. Dec. 386.

The Massachusetts court seems still to deny the validity of a direct gift from husband to wife. "Although in this commonwealth there has been much change in the law regarding the relations between husband and wife, and the power of a married woman to acquire property and make contracts, yet it is still the law here that, with certain exceptions as to wearing apparel and similar articles not material to this case, a married woman cannot acquire property by gift from her husband, though such a gift may be so far valid as to give the wife a right to the property at the

liarly subject to abuse, and they consequently require the careful scrutiny of the courts to see, first, that they were not procured by fraud, or an unfair use of the marital confidence between the parties; and, second, that they were not made in fraud of creditors.

The considerations which have already been discussed as applying to contracts between those about to marry, and to executory contracts between husband and wife, apply perhaps in even a higher degree to gifts, especially to those from the wife to the husband. The courts will ordinarily require them to be supported by satisfactory proof that they were freely and intelligently made, and especially without misrepresentation or concealment of material facts by the husband.[33]

In cases where the husband makes a gift to his wife, being at the time indebted, and the effect of the gift is to

death of her husband, as against his heirs or executors, but not against his creditors. Property thus given remains the property of the husband during his life, and may be demanded by him or attacked by his creditors. But this rule of law is applicable only in the case of direct gifts, and does not prevent the transfer of property from the husband to the wife through a third person." Brown v. Brown, 174 Mass. 197, 75 Am. St. Rep. 292. But the decision on the facts in this case show that the courts laid hold of rather slight facts on which to find a sufficient intervention of a third party to save the gift.

As to the title to clothing provided by the husband for the wife, see **Masson v. DeFries, (1909) 2 K. B. 831, 4 Brit. Rul. Cas. 601.**

33—Smyley v. Reese, 53 Ala. 89, 25 Am. Rep. 598; Meldrum v. Meldrum, 15 Colo. 478, 11 L. R. A. 65; Fritz v. Fernandez, 45 Fla. 318; Cain v. Ligon, 71 Ga. 629, 51 Am. Rep. 281; Hursen v. Hursen, 212 Ill. 377, 103 Am. St. Rep. 230; Livingston v. Hall, 73 Md. 286; Boyd v. De La Montagnie, 73 N. Y. 502, 29 Am. Rep. 197; Adoue v. Spencer, 62 N. J. Eq. 782, 90 Am. St. Rep. 484, 56 L. R. A. 817; Stiles v. Stiles, 14 Mich. 72; Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726.

In Cowdrey v. Cowdrey, 71 N. J. Eq. 353, a gift by a husband to his wife of the principal part of his real estate was permitted to be supported by proof that by an antenuptial agreement he had promised her the land, and that before executing the deed of gift he had paid her rent for the land.

prevent his creditors from being able to collect their debts, other important considerations arise. *Voluntary* transfers of property, that is, transfers without valuable consideration, if made with the intent to defraud creditors, are void as against such creditors; and conveyances without consideration, made when one is heavily indebted, and the natural effect of which will be to defeat claims of creditors, will be presumed to be fraudulent and will be set aside. Gifts from husband to wife are peculiarly liable to attack on this ground; nothing is more proper than for a man who has sufficient property, and who is free or substantially free from debt, to settle a portion of it on his wife, to secure her against the vicissitudes of life; and, on the contrary, nothing is more natural than for one who sees disaster approaching to try to put his property under cover, and defeat his creditors of their just claims, by conveying it to his wife. We can not go at length into this topic; the rule is one of fairness, of reasonableness, whether the gift was a reasonable provision for the wife, and such as creates no presumption of an intention to defraud. It depends largely upon the question whether the husband, at the time of the gift, was so largely indebted as to make the gift unreasonable, and likely to operate to the loss of creditors; if not, if it was fair when made, the fact that the donor afterward became indebted and lost his property will not invalidate the gift.[34]

34—The right of creditors to attack a conveyance which is in actual or constructive fraud of their rights is too large a subject to be treated as a sub-topic in the law of husband and wife. I can only refer the student to a few broad cases. Tne leading case is **Sexton v. Wheaton, 8 Wheaton (U. S.) 229,** opinion by Chief Justice Marshall. See also Moore v. Page, 111 U. S. 117; Trefethen v. Lyman, 90 Me. 376, 60 Am. St. Rep. 271, 38 L. R. A. 190; Williams v. Harris, 4 S. D. 22, 46 Am. St. Rep. 753; Adoue v. Spencer, 62 N. J. Eq. 782, 90 Am. St. Rep. 484, 56 L. R. A. 817.

For a full discussion of the American cases see the two notes, 90 Am. St. Rep. 484, and 56 L. R. A. 817; the former discusses the

As to the evidence necessary to prove a gift, the considerations applying to a gift between husband and wife differ greatly from those in relation to gifts between other persons. Since their possession and use of property is so much in common, clearer proof is necessary to show an actual gift, an actual intention to transfer the ownership followed by an actual transfer of possession, than if they were strangers; but on the other hand, if such actual making of the gift is satisfactorily proved, the marital relation of course supplies a sufficient motive and consideration.[35]

§ 96. Common property interests between husband and wife. *A. Tenancy by the entirety.* Not only the theoretical unity of person, but also the practical unity of possession and enjoyment, of husband and wife, affected in various ways the status of each as to the other's property. For instance, by the common law of England, a deed of land to a husband and wife conveyed the peculiar estate known

entire subject of attacks by creditors on conveyances by debtors to their wives, and the latter the particular question of the burden of proof in such contests.

35—See, for an interesting discussion of the considerations which apply to dealings between husband and wife, Fretz v. Roth, 68 N. J. Eq. 516, though it may well be thought that the learned vice-chancellor's treatment of the question is unduly favorable to the husband. See also Shuttleworth v. Winter, 55 N. Y. 624; Armitage v. Mace, 99 N. Y. 538; Jennings v. Davis, 38 Conn. 134; Fisk v. Cushman, 6 Cush. (Mass.) 20, 52 Am. Dec. 761; Kennebeck Bank v. Fogg, 83 Me. 374; Gittings v. Winter 101 Md. 194; Farrow v. Farrow, 72 N. J. Eq. 421; Flanner v. Butler, 131 N. C. 151, 92 Am. St. Rep. 773; Hannaford v. Dowale, 75 Ark. 127; Brown's Estate, 113 Iowa 351.

"A gift from wife to husband may be inferred from circumstances, such as the use and appropriation by him for a series of years, the wife having knowledge and not objecting; the presumption in such a case being stronger between husband and wife than between strangers." McLure v. Lancaster, 24 S. C. 273, 58 Am. Rep. 259.

Bergey's Appeal, 60 Pa. St. 408, 100 Am. Dec. 578, and Adoue v. Spencer, 62 N. J. Ed. 782, 90 Am. St. Rep. 484, 56 L. R. A. 817, interpret similar facts in quite the opposite spirit.

as "tenancy by the entirety." Since the grantees were but one person in the eye of the law, they took no separate estate, but together took the whole, *per tout et non per my*, and upon the death of either the other became, by force of the original grant, sole owner of the entire estate. During the marriage the husband of course had the entire control of the estate, and he could convey his estate, or it might be taken for his debts. But the title gained from him by deed or execution was defeated by the wife's survivorship to the whole estate, if she outlived him; on the other hand, if the husband survived the wife, his deed became effectual to transfer the whole title.[36]

Tenancy by the entirety was commonly recognized in the United States as a part of the common law, and continues to exist in nearly all the states, except as abolished or modified by statute.[37] But at an early time Connecti-

36—2 Bl. Com. 182; 4 Kent's Com. 362.

37—**Bartles v. Nunan 92 N. Y. 152, 44 Am. Rep. 361;** Hiles v. Fisher, 144 N. Y. 306, 43 Am. St. Rep. 762, 30 L. R. A. 305; Naler v. Ballew, 81 Ark. 328; Kunz v. Kurtz, 8 Del. Ch. 404; Kron v. Kron, 195 Ill. 181; Thornburg v. Wiggins, 135 Ind. 178, 41 Am. St. Rep. 422, 22 L. R. A. 42; Jordan v. Reynolds, 105 Md. 288, 121 Am. St. Rep. 578, 9 L. R. A. (N. S.) 1026; Pray v. Stebbins, 141 Mass. 219, 55 Am. Rep. 462; Phelps v. Simons, 159 Mass. 415, 38 Am. St. Rep. 430; Donahue v. Hubbard, 155 Mass. 537, 26 Am. St. Rep. 271, 14 L. R. A. 123; Pease v. Whitman, 182 Mass. 363; Jacobs v. Miller, 50 Mich. 119; Lewis's Appeal, 85 Mich. 340, 24 Am. St. Rep. 94; Johnston v. Johnston, 173 Mo. 91, 96 Am. St. Rep. 486, 61 L. R. A. 166; Buttlar v. Rosenblath, 42 N. J. Eq. 651, 59 Am. St. Rep. 52; Freeman v. Belfer, 173 N. C. 581, L. R. A. 1917 E 886; West v. Aberdeen R. Co., 140 N. C. 620, 6 Ann. Cas. 360; Alles v. Lyon, 216 Pa. St. 604, 116 Am. St. Rep. 791, 10 L. R. A. (N. S.) 463, 9 Ann. Cas. 137; Cole Mfg. Co. v. Collier, 95 Tenn. 115, 49 Am. St. Rep. 921, 30 L. R. A. 315; Beddingfield v. Estill, 118 Tenn. 39, 11 Ann. Cas. 904; Laird v. Perry, 74 Vt. 454, 59 L. R. A. 340; Wallace v. St. John, 119 Wisc. 593. The above cases present many interesting questions as to the effect of modern statutes on estates by entirety, which it is not possible to follow out here.

Many of the decisions as to the effect of modern statutes are reviewed in **Stifel Brewing Co. v.**

cut declined to recognize this exceptional title, and held that a deed to husband and wife made them joint tenants, as would a deed to any other two persons.[38] This decision has been followed in Ohio, which was once "The Western Reserve of Connecticut," and which in many ways follows its common law.[39]

In many states in which the common law rule of the complete inability of the wife to hold personal property has ceased to prevail, the doctrine of entirety has been applied to personal property as well as to real estate.[40]

§ 97. *B. Larceny between husband and wife.* It is evident that as long as all the wife's personal property passed to the husband by the marriage, he could not commit larceny of her property. And it was also held that the wife, because of the unity of person and of interest, and because the possession and ownership taken by her was in the eye of the law his, could not steal his personal property.[41] It has been held that, even under statutes which restore to the wife the control and title of her property, the possession of husband and wife is so far united that he can not be guilty of larceny of her property;[42] but in some

Saxy, 273 Mo. 159, L. R. A. 1918 C 1009.

It is commonly held that a divorce destroys an estate by the entirety, and makes the parties tenants in common, though there are contrary rulings in Michigan and Pennsylvania. McKinnon v. Caulk, 167 N. C. 411, L. R. A. 1915 C 396 and note. But a divorce *a mensa et thoro* does not affect an existing estate by the entirety. Freeman v. Belfer, 173 N. C. 581, L. R. A. 1917 E 886.

38—Whittelsey v. Fuller, 11 Conn. 337.

39—Farmer's Nat'l Bank v. Wallace, 45 Ohio St. 152.

40—Brewer v. Bowersox, 92 Md. 567; Phelps v. Simons, 159 Mass. 415, 38 Am. St. Rep. 430; Johnston v. Johnston, 173 Mo. 91, 96 Am. St. Rep. 486, 61 L. R. A. 166; Bramberry's Estate, 156 Pa. 628, 36 Am. St. Rep. 64, 22 L. R. A. 594.

41—Queen v. Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397; State v. Banks, 48 Ind. 197; Lamphier v. State, 70 Ind. 317. See also Com. v. Hartnett, 3 Gray (Mass.) 450.

42—Thomas v. Thomas, 51 Ill. 162; Overton v. State, 43 Tex. 616; State v. Phillips, 85 Ohio St. 317, 40 L. R. A. (N. S.) 142, Ann.

recent cases of an aggravated nature, a husband has been convicted of stealing from his wife.[43] On analogous grounds, one spouse could not, at the common law, commit arson of the other's house.[44]

§ 98. *C. Adverse possession and the statute of limitation between husband and wife.* It results also from the community of possession of husband and wife that neither can obtain title by adverse possession as against the other by the mere occupancy of land as if it were his or her own. The occupancy of either or of both will be supposed to be under the title of the true owner.[45] The husband also can not obtain title against his wife by buying her land at a tax sale.[46] And, even though suits may be maintained between husband and wife under most modern statutes, the law does not favor such suits, nor penalize delay in bringing them. The statute of limitations, therefore, will not ordinarily run between husband and wife.[47]

Cas. 1913 B 250. See Walker v. Reamy, 36 Pa. St. 410.

43—**Hunt v. State, 72 Ark. 241, 105 Am. St. Rep. 34, 65 L. R. A. 71, 2 Ann. Cas. 33;** Beasley v. State, 138 Ind. 552, 46 Am. St. Rep. 418. In each of these cases the marriage itself was a part of a fraudulent scheme of the accused to get possession of her property by marriage, and then to steal it and desert her. Under the present English statutes a wife can commit larceny of her husband's goods. Rex v. James, (1902) 1 K. B. 540, 20 Cox C. C. 156.

44—Kopcyznski v. State, 137 Wis. 358, 16 Ann. Cas. 365 and note.

45—**Bell v. Bell, 37 Ala. 536, 79 Am. Dec. 73;** Skinner v. Hale, 76 Conn. 223; Swiger v. Swiger, 58 W. Va. 119; Reagle v. Reagle, 179 Pa. St. 89; Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; Stiff v. Cobb, 126 Ala. 381, 85 Am. St. Rep. 38; Hays v. Marsh, 123 Iowa 81; Boynton v. Miller, 144 Mo. 681.

46—Fuller v. Edens, 70 W. Va. 248, Ann. Cas. 1913 E 544 and note.

47—Barnett v. Harsbarger, 105 Ind. 410; Beal v. Beal, 89 Ky. 314, 25 Am. St. Rep. 534; Bowie v. Stonestreet, 6 Md. 418, 61 Am. Dec. 318; Collins v. Babbitt, 67 N. J. Eq. 165; 2nd Nat'l Bank of Beloit v. Merrill, 81 Wisc. 151, 29 Am. St. Rep. 77; Fawcett v. Fawcett, 85 Wisc. 332, 39 Am. St. Rep. 844. *Contra*, Deaner v. Deaner, 126 Iowa 701, 106 Am. St. Rep. 374; **Graves v. Howard, 159 N. C. 594, Ann. Cas. 1914 C 565 and note.**

§ 99. Suits between husband and wife. What has already been said as to the incapacity of a married woman to sue or be sued at common law applies *a fortiori* to a suit by her against her husband, or by the husband against her. Their theoretical unity, their lack of power to contract together, and the technical rule that the husband must always join with his wife as co-plaintiff, or be joined as co-defendant, united to make the idea of an action at law between husband and wife absolutely unthinkable to common law judges. From the earliest times some legal proceedings must by their very nature have been permitted between them, such as actions for judicial separation, for separate maintenance, or for restitution of conjugal rights. But, as these proceedings were all within the exclusive jurisdiction of the ecclesiastical courts, they did not impugn the principle already stated. But the equity courts, having recognized contracts between husband and wife,[48] and having created a great class of property known as the wife's sole and separate estate,[49] necessarily permitted suits by her to enforce her equitable rights, and against her to enforce the equitable obligations resting upon her or her estate, even when her husband was the adverse party.[50] And the great statutory changes by which, first, all her property has become her sole and separate estate, and, second, legal and equitable rights alike have become enforceable in the code states by the "civil action" of the codes, have in some states wholly abolished the old restrictions, and made suits maintainable between husband and wife, in relation to property and contract rights, as freely as if they were strangers.[51] Other states have advanced

48—See, *ante*, § 92.

49—See, *post*, ch. XV.

50—Story's Eq. Jur., Ch. 38, especially § 1368; 2 Kent's Com. 164; **Frankel v. Frankel, 173 Mass. 214, 73 Am. St. Rep. 266;** Porter v. Bank of Rutland, 19 Vt. 410; Barber v. Barber, 21 How. (U. S.) 582; Heckman v. Heckman, 215 Pa. St. 203, 114 Am. St. Rep. 953.

51—In Mathewson v. Mathewson, 79 Conn. 23, 5 L. R. A. (N.

S.) 611, 6 Ann. Cas. 1027, a woman sued her husband on a promissory note; the complaint simply alleged the execution and delivery of the note and its non-payment, and it did not even appear from the writ or complaint that plaintiff and defendant were wife and husband. The Connecticut Married Women's Act of 1877 does not mention her capacity to sue or be sued, but in terms gives her "power to contract with third persons as if unmarried." The defendant argued that by inference the power to contract with her husband was denied, and that no suit could be maintained except upon allegations showing an equitable cause of action growing out of dealings with her separate property. The court discussed the existing relations between husband and wife in the broadest spirit, and held that by the general terms of the act of 1877 the theory of unity and subordination of the wife as to property matters has been completely overthrown, that she is now a person *sui juris*, and that any limitation upon their rights must rest upon some positive provision of law, and not upon a mere inference from silence. "An act which changes the foundations of the status necessarily involves the consequences of the new status and not of the old, and these consequences cannot be prohibited by inference, unless the inference of prohibition is necessary." The action was therefore sustained. Prior to the act of 1877, a Connecticut wife could sue only in equity as in the cases cited in the next note. Muller v. Witte, 78 Conn. 495.

The effect of the code system upon suits between husband and wife is nowhere more clearly stated than in Wright v. Wright, 54 N. Y. 437, 442. "While it is admitted that the rights of the plaintiff could be enforced by suit in equity, yet it is insisted that this, being an action at law, cannot be maintained by a married woman against her husband. It might be asked by what authority the defendant names this an action at law? What additional allegation in the complaint would have enabled the defendant to designate it as a suit in equity? Nothing more could be truly said than that the consideration of the note was a promise to marry, which had been performed, and all this was proved without objection. Certainly the defendant has been deprived of no legal rights, and if the form of the pleadings was not agreeable to him, it was very easy to have them made to conform to the facts proved by a proper application. While regard is still to be had in the application of legal or equitable principles, there is not of necessity any difference in the mere form of procedure, so far as the case to be stated in the complaint is concerned. All that is needful is to state the facts sufficient to show that the plaintiff is entitled to the relief demanded, and it is the duty of the court

more timidly, and permit only suits in equity, or to enforce rights of an equitable nature.[52]

But until very recently it was universally held that the right of action between husband and wife, however unrestricted it might be as to property rights, did not extend to suits for a tort to the person. It was said that, however much the property relations of husband and wife have been altered, their personal relations are substantially unchanged. And it was deemed better to leave the protection of the married persons from each other's violence to the

to afford the relief without stopping to speculate upon the name to be given to the action. Indeed, if some such result has not been obtained by the code of procedure, we are still in the labyrinth of legal technicalities in practice and pleadings contrived long ago, and tending to enslave the administration of justice, and from which it had been hoped we had, by legislative aid, secured comparative freedom."

Accordingly in New York actions of almost every kind relating to property or pecuniary rights have been maintained between husband and wife. Wood v. Wood, 83 N. Y. 575.

Other cases affirming the full right of action between husband and wife are Rice v. Sally, 176 Mo. 107; Graves v. Howard, 159 N. C. 594, Ann. Cas. 1914 C 565; May v. May, 9 Neb. 16, 31 Am. Rep. 399; Wilson v. Wilson, 36 Cal. 447, 95 Am. Dec. 194; Smith v. Smith, 20 R. I. 556; Gillespie v. Gillespie, 64 Minn. 381. In Manning v. Manning, 79 N. C. 293, 28 Am. Rep. 294, it was held that the wife could sue the husband to recover her real estate from which he had evicted her, but that the judgment must be so framed as to preserve his marital right of co-occupancy with her.

52—Small v. Small, 129 Pa. St. 366 (but in McKendry v. Fessler, 131 Pa. St. 24, 6 L. R. A. 506, she was permitted to sue him in the statutory action of ejection which was regarded "as a substitute for a bill in equity"). So in Indiana it seems that a suit between husband and wife will not lie on a note, without the allegation of special equities (Harrell v. Harrell, 117 Ind. 94), but that ejectment will lie to recover from him the wife's separate real estate; Crater v. Crater, 118 Ind. 521, 10 Am. St. Rep. 161. See also Frankel v. Frankel, 173 Mass. 214, 73 Am. St. Rep. 266; Heacock v. Heacock, 108 Iowa 540, 75 Am. St. Rep. 273; Drum v. Drum, 69 N. J. L. 557; Buttlar v. Buttlar, 71 N. J. Eq. 671; Kalfus v. Kalfus, 92 Ky. 542; Chestnut v. Chestnut, 77 Ill. 346; Perkins v. Blethen, 107 Me. 443, 31 L. R. A. (N. S.) 1148.

criminal law than to attempt to redress such injuries by judgments for damages.[53]

In 1910 the Supreme Court of the United States followed these decisions, but with a strong dissent by Justices Harlan, Holmes and Hughes.[54]

But in 1914 the Connecticut Supreme Court, disregarding the long line of precedents, re-examined the question on principle, and sustained an action by a wife against her husband for assault and battery.[55]

This decision has already been followed in several other states;[56] but the Virginia Supreme Court, after a review of all the cases, refused to follow the Connecticut decision and adhered to the older rule.[57]

53—**Bandfield v. Bandfield, 117 Mich. 80, 72 Am. St. Rep. 550, 40 L. R. A. 757;** Peters v. Peters, 156 Cal. 32, 23 L. R. A. (N. S.) 699; Peters v. Peters, 42 Iowa 182; Abbott v. Abbott, 67 Me 304, 24 Am. Rep. 27; Libby v. Berry, 74 Me. 286, 43 Am. Rep. 589; Strom v. Strom, 98 Minn. 427, 116 Am. St. Rep. 387, 6 L. R. A. (N. S.) 191; Lillienkamp v. Rippetoe, 133 Tenn. 57, Ann. Cas. 1917 C 901; Schultz v. Christopher, 65 Wash. 496, 38 L. R. A. (N. S.) 780.

54—Thompson v. Thompson, 218 U. S. 611, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921.

55—Brown v. Brown, 88 Conn. 42, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915 D 70.

56—Fitzpatrick v. Owens, 124 Ark. 167, L. R. A. (N. S.) 1917 B 774, Ann. Cas. 1918 B 772 and note; Gilman v. Gilman, 78 N. H. 4, L. R. A. 1916 B 907; Fiedler v. Fiedler, 42 Okla. 124, 52 L. R. A. (N. S.) 189. In Fiedler v. Fiedler, and in Lillienkamp v. Rippetoe, cited in note 53, the action was brought after a divorce, for a tort to the person committed while the marriage was in force, but that fact did not control the decision in either case.

57—**Osburn v. Keister, — Va. —, 1 A. L. R. 439.**

CHAPTER XIV

THE RIGHT OF THE SURVIVING HUSBAND OR WIFE IN THE OTHER'S PROPERTY.

§ 100. The rights of the husband. *A. In his deceased wife's real estate—tenancy by the curtesy.* It has already been stated that by marriage, followed by the birth of a living child capable of inheriting the wife's real estate, the husband became "Tenant by the Curtesy Initiate" in the wife's real estate. Upon the subsequent death of the wife this estate by the curtesy became consummate, and the husband's estate continued for his own life. He was called "Tenant by the Curtesy of England," or, more briefly, "Tenant by the Curtesy."[1] It will be noted that four facts are essential to confer the complete estate by the curtesy: the marriage, the wife's seisin of the real estate either at or after the time of the marriage, the birth of a child of the marriage, the wife's death before her husband's.[2] The first and fourth requisites above mentioned, the marriage of the parties and the wife's death before her husband's, need no further discussion.

The wife, at some time during the coverture, must have been *seised* of the estate; that is, she must have been in possession of it under a title not merely for years or for life, but which is so limited as to descend to her heirs. It need not necessarily be an estate in fee simple; an estate

1—See, *ante*, § 68; 2 Bl. Com., 126; 4 Kent's Com., 27-35.

2—2 Bl. Comm. 127;4 Kent's Comm. 29; **Dozier v. Toalson, 180 Mo. 546, 103 Am. St. Rep. 586;** Todd v. Oviatt, 58 Conn. 174, 182, 7 L. R. A. 693; Ferguson v. Tweedy, 43 N. Y. 543; Day v. Burgess, 139 Tenn. 559, L. R. A. 1918 E 692; Carpenter v. Garrett, 75 Va. 129; Breeding v. Davis, 77 Va. 639, 46 Am. Rep. 740.

in fee tail was sufficient.[3] By the common law the wife must have taken actual possession of the land. But by the law of many of the American states a right of possession is sufficient, if there be no adverse possession. The right of possession, in the absence of any adverse possession, is considered equivalent to actual possession and is called constructive seisin. But if the wife owned only a remainder or reversionary estate, that is, a right to take it after the expiration of a life estate in some other person, and the life estate never expired during the marriage, the wife never acquired seisin and the husband takes no curtesy.[4]

In Connecticut and Ohio the decisions have gone farther in support of curtesy, and an estate in fee with the right of present possession is equivalent to actual seisin, even though the estate be in the actual possession of an adverse claimant. But even in those states there must be the *right*

3—Holden v. Wells, 18 R. I. 802; Waller v. Martin, 106 Tenn. 341, 82 Am. St. Rep. 882.

A father devised land to his daughter and to her heirs and assigns forever, "not in any manner subject to the sale or disposal of her husband in any way, manner or form whatever." Held, that the will shows no intent to exclude curtesy, and that the testator, having given a fee, could not limit its essential incidents. Mullany v. Mullany, 4 N. J. Eq. 16, 31 Am. Dec. 238.

4—2 Bl. Com. 127; 4 Kent's Com. 29, 30; Collins v. Russell, 181 N. Y. 74, 112 Am. St. Rep. 569, 6 Ann. Cas. 92; Dozier v. Toalson, 180 Mo. 546, 103 Am. St. Rep. 586; Wells v. Thompson, 13 Ala. 793, 48 Am. Dec. 76; Adams v. Butts, 9 Conn. 79; Ferguson v. Tweedy, 43 N. Y. 543; Shores v. Carley, 8 Allen (Mass.) 425; Mettler v. Miller, 129 Ill. 630; Sweeney v. Montgomery, 85 Ky. 65; Malone v. McLaurin, 40 Miss. 161, 90 Am. Dec. 320; Reed v. Reed, 3 Head (Tenn.) 491, 75 Am. Dec. 777; Bragg v. Wiseman, 55 W. Va. 330; Davis v. Mason, 1 Peters (U. S.) 507; Mercer v. Selden, 1 How. (U. S.) 37.

In Virginia, where a dowress had remained in occupation of the entire homestead, using it as her own and supporting the children, who were the heirs at law, thereon, one of said children did not have such seisin as to give curtesy to her husband. Carpenter v. Garrett, 75 Va. 129.

If the wife and another person were seised as tenants in common, the husband is entitled to curtesy in his wife's half at her death. McNeely v. Oil Co., 52 W. Va. 616, 62 L. R. A. 562.

of possession; a title to a remainder interest, dependent on a life estate which does not terminate during the wife's life, is not sufficient.[5]

The wife's title need not necessarily be of a legal estate; if it is only an equitable estate, as the equity of redemption of mortgaged land, or the beneficial interest in a trust, but is vested in the wife and her heirs, the husband takes his curtesy.[6]

As to the third requirement, it is sufficient that the child should have been born alive; the continuance of its life, even for a minute, is not essential.[7] And it must have been

5—In 1810, the Connecticut Supreme Court of Errors held that the English rule was not in harmony with the general Connecticut law as to seisin, and that the husband was entitled to his estate by the curtesy in lands to which the wife had the legal title in fee, though she was ousted of possession and an adverse claimant was in possession during the entire marriage. "It must be acknowledged by all that our system of law respecting real property is in many respects very different from the English system. * * * Seisin directs the descent with them; ownership with us. * * * Wherever you find a right of property you find a right of possession, and all the consequences attending it that you find in England where there is an actual seisin." Bush v. Bradley, 4 Day (Conn.) 298. This was followed in Kline v. Beebe, 6 Conn. 494; Todd v. Oviatt, 58 Conn. 174, 7 L. R. A. 693; and in Ward v. Ives, 75 Conn. 598.

The same exceptional rule exists in Ohio. Borland v. Marshall, 2 Ohio St. 308; Mitchell v. Ryan, 3 Ohio St. 377; Merritt v. Horne, 5 Ohio St. 307, 67 Am. Dec. 298.

The early Pennsylvania cases of Stoolfoos v. Jenkins, 8 Serg. & R. (Pa.) 175, and Chew v. Southwark, 5 Rawle (Pa.) 160, seem to support Bush v. Bradley in their language; but Buchanan v. Duncan, 40 Pa. St. 28, follows the prevailing rule of constructive seisin. No cases are found except those in Connecticut and Ohio in which curtesy is allowed where there was an actual adverse possession during the marriage.

6—1 Kent's Comm. 30, 31; Davis v. Mason, 1 Peters (U. S.) 507; Gilmore v. Gilmore, 7 Ore. 374, 33 Am. Rep. 710; McCory v. King, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165.

As to curtesy in lands held by the wife as her equitable sole and separate estate, see *post*, § 114.

7—2 Bl. Comm. 127; Goff v. Anderson, 91 Ky. 303; Marsellis v. Thalheimer, 2 Paige Ch. (N. Y.) 35, 21 Am. Dec. 66.

a child capable of being an heir to the estate; for instance, if the estate were in tail male, limited in its descent to male heirs, and the child of the marriage were a female, it would not confer a tenancy by the curtesy on the father.[8] In many of the states curtesy has been abolished or materially altered by statute.[9]

§ 101. *B. In her personal estate.* Since by the marriage the husband acquired absolute title to the wife's personal property in possession, the right of survivorship in her chattels real, and the right to reduce to his own possession and ownership her choses in action, there was left at common law no personal property to become a part of her estate in case of her death before her husband's, except her unreduced choses in action. Under the doctrine of sole and separate estate, however, there grew up a class of personal estate owned by the wife, but to which the marital rights of the husband did not attach.[10] At her death, therefore, this passed to her administrator for distribution.

By the immemorial practice in England, after the bishop ceased to have the right of administration of all estates, and was required to appoint the next and most lawful of kin of every deceased person as administrator,[11] the hus-

8—2 Bl. Comm. 128. Consequently it has been held that where a woman after the birth and death of a child became seised of land, and had no subsequent child, the husband took no curtesy. Haywood v. Moore, 2 Humph. (Tenn.) 584. I feel much doubt as to the accuracy of this application of the doctrine. The husband's right of curtesy is not however limited to the interest which his child will inherit. Where a woman having a prior child married, and had a child by the marriage, the husband upon her death took curtesy in the entire estate, though his child was heir to only one-half. Heath v. White, 5 Conn. 228.

9—An extended review of such statutes is given in the note, L. R. A. 1915 D 1004-1010.

As to the liability of an estate by the curtesy initiate for the husband's debts, at common law and by modern statutes, see the note, Ann. Cas. 1914 C 1187-9.

10—See the next chapter.

11—Stat. 31 Edw. III, Ch. 1, § 11.

band of a deceased woman was entitled to be appointed as her administrator; and by the Statute of Charles II,[12] he was relieved from liability to account to any one for the surplus after payment of his wife's debts, and thereby, by effectual though indirect provisions of law, he succeeded to any personal estate which had not come to him by his marital rights during her life.[13] This right of the husband to take by administration such of his wife's chattels as he had not already acquired by marriage, except in so far as they were required for paying her debts, has been recognized in most of the American states;[14] but in a few it was denied, and the husband took no right in his wife's personal property, until it was conferred upon him by some express statute to that effect.[15]

§ 102. The rights of the wife. *A. Her dower interest in the husband's real estate.* The only interest which the wife acquired in her husband's property by marriage at the common law was dower. By that right she was entitled, upon surviving her husband, to the use, rents and profits, for the term of her natural life, of one-third of all the real estate of which he had been seised at any time

12—Stat. 29 Chas. II, Ch. 3.

13—See for a full historical discussion of the course of the English law on this subject, Reeve on Dom. Rel., 12 to 19. See also 2 Bl. Comm. 515; 2 Kent's Comm. 135.

14—**Robins v. McClure, 100 N. Y. 328, 53 Am. Rep. 184,** and prior N. Y. cases there cited; Bartlett v. Bartlett, 137 Mass. 156; Kenyon v. Saunders, 18 R. I. 590, 26 L. R. A. 232; Rice v. Thompson, 14 B. Mon. (Ky.) 377; Judge of Probate v. Chamberlain, 3 N. H. 129; Atherton v. McQuesten, 46 N. H. 205; Hoskins v. Miller, 2 Dev. L. (N. C.) 360; Box v. Lanier, 112 Tenn. 393, 64 L. R. A. 458; Donnington v. Mitchell, 2 N. J. Eq. 243; Nelson v. Nelson, 57 N. J. Eq. 118. In Robins v. McClure, Kenyon v. Saunders, and others of the above cases, this marital right of the husband is held not to be taken away by general statutes giving the wife full control of her property.

15—Baldwin v. Carter, 17 Conn. 201, 42 Am. Dec. 735; Locke v. McPherson, 163 Mo. 493, 85 Am. St. Rep. 546, 52 L. R. A. 420; Curry v. Fulkinson, 14 Ohio 100; Saulnier's Estate, 3 Whart. (Pa.) 442; Holmes v. Holmes, 28 Vt. 765.

during the coverture.[16] His estate must have been in fee simple or fee tail; and if it was in fee tail the limitation of the entail must have been such that it would have been possible for the estate to be inherited by issue of the wife who claims dower; for instance, if the husband had received a grant of land to him and the heirs of his body to be born of his wife Susan, and if Susan should afterward die and he should marry Jane, Jane would take no dower therein.[17] But the birth of any children is not essential to dower, the estate differing in this respect from curtesy.

Seisin in law by the husband, that is, the right of possession without actual possession, is equally effectual with seisin in fact as a basis to support the wife's dower; dower and curtesy differing in this respect.[18] A plausible ex-

16—2 Bl. Comm. 129; 4 Kent's Comm. 357; **Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205**; Wait v. Wait, 4 N. Y. 95; McCraney v. McCraney, 5 Iowa 232, 68 Am. Dec. 702; Butler v. Fitzgerald, 43 Neb. 192, 47 Am. St. Rep. 741.

See the history and meaning of the word "dower" discussed in Johnson v. Goss, 132 Mass. 247.

"Dower is an estate favored by the law." Greene v. Huntington, 73 Conn. 106, 113; McMahan v. Kimball, 3 Blackf. (Ind.) 1, 7; Kennedy v. Nedrow, 1 Dallas (Pa.) 417.

"Dower being a cherished and immediate jewel of the common law, all doubts are to be resolved in its favor." Chrisman v. Linderman, 202 Mo. 605.

"As Lord Bacon stated nearly two hundred and fifty years since, the tenant in dower was so much favored in the courts that at that early period it had become 'the common by-word in the law, that the law favoreth three things, life, liberty and dower.'" Church v. Bull, 2 Denio (N. Y.) 430.

17—2 Bl. Comm. 131; 4 Kent's Comm. 35; House v. Jackson, 50 N. Y. 161. The widow is not entitled to dower in a leasehold for nine hundred and ninety-nine years, subject to payment of annual rental. Goodwin v. Goodwin, 33 Conn. 314.

18—2 Bl. Comm. 131; 4 Kent's Comm. 37; **McGuire v. Cook, 98 Ark. 118, Ann. Cas. 1912 D 776 and note**; Atwood v. Atwood, 22 Pick. (Mass.) 283; Phelps v. Phelps, 143 N. Y. 197, 25 L. R. A. 625; Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205.

But if the husband's right was only to a remainder after a life estate, and he died before the termination of the life estate, his widow takes no dower. Kellett v.

planation may be given for this distinction in that fault may naturally be attributed to the husband if his wife's right of possession, which he by the marriage has the right to enforce, is not enforced; while no fault can be attributed to the wife, and no forfeiture justly be imposed upon her, by reason of the husband's rights being neglected.

Since, as above defined, the right of the wife attached not merely to the land left by the husband at his death, but to all of which he had been seised during the coverture, her inchoate right of dower is during the coverture a subsisting interest, recognized and protected by the law, and is an incumbrance upon all the husband's land.[19] It was necessary at the common law that she should unite with him in levying a fine, or suffering a common recovery, in order to release her inchoate right of dower; and the same reason has made it necessary for the wife to unite with the husband in a conveyance of his lands, in order to give an un-

Shepard, 139 Ill. 433; Watson v. Watson, 150 Mass. 84; Durando v. Durando, 23 N. Y. 33.

As to the rule in cases of "instantaneous seisin," that is, when at a single transaction the husband received a deed and made a reconveyance, see McCauley v. Grimes, 2 Gill and J. (Md.) 318, 20 Am. Dec. 434.

19—**Re Alexander, 53 N. J. Eq. 96;** Kelly v. McGrath, 70 Ala. 75, 45 Am. Rep. 75; Chandler v. Hollingsworth, 3 Del. Ch. 99; Whistler v. Hicks, 5 Blackf. (Ind.) 100, 33 Am. Dec. 454; Vaughn v. Dowden, 126 Ind. 406; Porter v. Noyes, 2 Me. 22, 11 Am. Dec. 30; Davis v. Wetherell, 13 Allen (Mass.) 60, 90 Am. Dec. 177; Bigelow v. Hubbard, 97 Mass. 195; Greenwood v. Ligon, 10 Smed. & M. (Miss.) 615, 48 Am. Dec. 775; Grady v. McCorkle, 57 Mo. 172, 17 Am. Rep. 676; Butler v. Fitzgerald, 43 Neb. 192, 47 Am. St. Rep. 741; Johnson v. Nyce, 17 Ohio 66, 49 Am. Dec. 444; Mandel v. McClave, 46 Ohio St. 407, 15 Am. St. Rep. 627, 5 L. R. A. 519; Gatewood v. Gatewood, 75 Va. 407; Ficklin v. Rixey, 89 Va. 832, 39 Am. St. Rep. 891.

"An inchoate right of dower in land is a subsisting and valuable interest which will be protected and preserved to her, and she has a right of action to that end." Simar v. Canaday, 53 N. Y. 298, 304, 13 Am. Rep. 523.

Rules for ascertaining the value of the inchoate dower right are laid down in Jackson v. Edwards, 7 Paige Ch. (N. Y.) 386, and in Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

incumbered title, in those states of the Union where the common law of dower still exists.[20] Nevertheless, her inchoate right of dower in her husband's land is not deemed an independent vested title, but rather a mere expectancy or possibility, which she can not convey, except to release it to her husband's grantee.[21]

Dower did not, at the older common law, extend to equitable estates of the husband.[22] But this has almost

20—4 Kent's Comm. 41; Dundas v. Hitchcock, 12 How. (U. S.) 256; Learned v. Cutler, 18 Pick. (Mass.) 9; Elmendorf v. Lockwood, 57 N. Y. 324.

And the courts will not undertake to compel a husband to procure his wife's release of dower, though he has contracted to do so; since "the policy of the law is that the wife is not to part with her property but by her own spontaneous and free will." Weed v. Terry, 2 Douglass (Mich.) 344, 45 Am. Dec. 257.

21—Randall v. Krieger, 23 Wall. (U. S.) 137; Davis v. Wetherell, 13 Allen (Mass.) 60, 90 Am. Dec. 177; Moore v. New York, 8 N. Y. 110, 59 Am. Dec. 473; Marvin v. Smith, 46 N. Y. 571; Malloney v. Horan, 49 N. Y. 111, 10 Am. Rep. 335; Hinchliffe v. Shea, 103 N. Y. 153; Whitthaus v. Schack, 105 N. Y. 332.

"A right of dower in a married woman, before it has become consummate by the death of her husband, is a mere intangible, inchoate, contingent expectancy, and not only is not an interest in land, but does not even rise to the dignity of a vested right." Goodkind v. Bartlett, 136 Ill. 18.

"Though she had no actual estate in the dower during the life of her husband, yet she had an interest and a right of which she could not be divested but by her own consent or crime, or her dying before her husband. It was a valuable interest, which is frequently the subject of contract and bargain. It was an interest which the law recognizes as the subject of conveyance by fine in England, and by deed with us. It is more or less valuable according to the relative ages, constitution and habit of the husband and wife. It is more than a possibility, and may well be denominated a contingent interest." Bullard v. Briggs, 7 Pick. (Mass.) 538, 19 Am. Dec. 292.

22—4 Kent's Comm. 43, 44; Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205.

23—4 Kent's Comm. 44, 46; Greene v. Huntington, 73 Conn. 106; Stroup v. Stroup, 140 Ind. 179, 27 L. R. A. 523; Snow v. Stevens, 15 Mass. 278; Davis v. Wetherell, 13 Allen (Mass.) 60, 90 Am. Dec. 177; Yeo v. Mercereau, 18 N. J. L. 387; McMahon v. Kimball, 3 Blackf. (Ind.) 1; Stevens v. Smith, 4 J. J. Marsh (Ky.) 65, 60 Am. Dec. 205.

But where a husband paid for

universally been changed by later decisions or statutes,[23] thus harmonizing the law as to curtesy and as to dower on this point. Nor does dower attach to a mere legal title held by the husband in trust for some other person.[24]

In several of the American states dower was from the beginning confined to real estate which the husband owned at the time of his death.[25] This materially alters the nature of the estate, makes it a mere right of succession at his death instead of a vested interest during the husband's life, and makes it possible for the husband to convey his

land and had it conveyed to a third person with an agreement that the husband should have the full control and benefit of it, which was done in order to defeat the wife's dower, it was held that the husband had never had any seisin from which she could derive dower. Phelps v. Phelps, 143 N. Y. 197, 25 L. R. A. 625. *Contra*, Stroup v. Stroup, *supra*.

And see the full discussion of the wife's rights to set aside deeds made before marriage in fraud of her dower rights in Deke v. Huenkemeier, 260 Ill. 131, 48 L. R. A. (N. S.) 512 and note, Ann. Cas. 1914 D 290 and note.

24—Barker v. Smiley, 218 Ill. 68; Goddard v. Prentice, 17 Conn. 546. And where the husband at the same time received a deed and executed an agreement to reconvey, the wife has no right of dower. Hallet v. Parker, 68 N. H. 598.

But where the husband before the marriage had executed contracts of sale of the land to be paid for in installments, it was held that the right of dower attached to his legal title subject to the equity of the purchasers, so as to entitle the wife to an equivalent for dower in the moneys remaining due. Re Pulling, 97 Mich. 375.

25—4 Kent's Comm. 41; Connecticut Laws of 1673, page 21; DeForest's Appeal, 1 Root (Conn.) 50; Stewart v. Stewart, 5 Conn. 317; Brown's Appeal, 72 Conn. 148, 154, 49 L .R. A. 144; Vermont Laws of 1787, page 55, § 8.

In North Carolina by the act of 1784 dower was confined to lands of which the husband died seised; Winstead v. Winstead, 1 Hayw. (N. C.) 243; but by the act of 1868-9, the common law dower was restored. Sutton v. Askew, 66 N. C. 172, 8 Am. Rep. 500.

In Georgia dower was limited by statute in 1826 to lands of which the husband was seised at his death, and which he acquired by his marriage, and that limitation still remains. Chapman v. Schroeder, 10 Ga. 324; Ga. Code, § 4687.

So by the act of 1784 in Tennessee; Combs v. Young, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225.

land without the wife's joining in the deed. In many other states the general revision by statute of the property rights of husband and wife have included the abolition or material modification of the right of dower.[26] In England also it has been enacted that "No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will."[27]

Since the wife's dower vested in her, in point of title, as soon as the husband became seised, it is superior to the testamentary power of the husband; he can not defeat it by devising the lands to others or for the payment of debts,[28] and if he gives to the widow a devise or bequest in lieu of dower, she has her election whether to accept it, or to insist on her right of dower.[29] It is moreover paramount to the claims of the creditors of the deceased, as well as to those of the heirs, and it is not in the power of either to defeat it.[30] From this principle results the preference of bequests in lieu of dower above other bequests, which is more fully discussed hereafter.[31]

And these features of the law of dower—its superiority to the will of the husband, or to his debts—though they resulted from the common law view of dower as a vested interest, are retained in the states where dower vests only at the husband's death.

Dower arises not from the contract of the parties, but from the positive provisions of the law. The law-making power can limit or qualify it, and has done so in almost every jurisdiction. It is therefore subject to the inheritance

26—See Ch. XVI.

27—Stat. 3 & 4 William IV, Ch. 105, § 4; Rowland v. Cuthbertson, L. R. 8 Eq. 466; Lacey v. Hill, L. R. 19 Eq. 346.

28—4 Kent's Comm. 50.

29—See *post*, § 107.

30—Crocker v. Fox, 1 Root (Conn.) 227; Calder v. Bull, 2 Root (Conn.) 50; Combs v. Young, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225.

As to the priority between dower and a purchase-money mortgage or vendor's lien, see the very full note, 48 L. R. A. (N. S.) 540-561.

31—See *post*, § 107.

tax on property which may "pass by will or by the intestate laws."[32]

Dower at the common law, if the heir refused to assign it to the widow, could only be recovered by an elaborate and expensive suit, the Writ of Right of Dower; but by the modern American practice dower is assigned to the widow by the Court of Probate (Surrogate's Court or Orphans' Court, as the same court is variously called), as a part of the settlement of the estate.[33]

§ 103. Five methods of barring dower. The burdensome incumbrance cast upon all the husband's real estate by the existence of his wife's inchoate right of dower led to the adoption of various devices to avoid it until, as Blackstone says: "Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom."[34] Five modes of barring dower have had sufficient legal recognition to require mention. First, the grant of dower *ad ostium ecclesiae;* second, common law jointure; third, equitable or statutory jointure, or antenuptial agreement; fourth, devise or bequest in lieu of dower, which the widow accepts; fifth, divorce, or the wife's elopement. To these might be added, as a sixth mode of barring dower, the release by the wife of her dower, by joining in the husband's deed, already spoken of.

§ 104 A. *Dower ad ostium ecclesiae.* The first method devised for affecting this purpose was by the definite grant to her, at the church door, and as a part of the marriage ceremony, of certain lands for her dower. This endowment, if assented to by the wife at the time, was binding upon her as well as upon the husband; otherwise she had

32—**State v. Dunn, 174 N. C. 679, Ann. Cas. 1918 D 1086; Billings v.** People, 189 Ill. 472, 59 L. R. A. 807. *Contra,* Crenshaw v. Moore, 124 Tenn. 528, 34 L. R. A. (N. S.) 1161, Ann. Cas. 1913 A 164 and note.

33—Shaefe v. O'Neil, 9 Mass. 9.

34—2 Bl. Comm. 136.

her election after the death of the husband to claim her common law dower. If she had assented to, or afterwards elected to take, the dower *ad ostium,* she might immediately enter upon it at her husband's death, without any process. This is said to have been the most usual species of dower in the twelfth century, but it afterward fell into disuse,[35] jointure having become the more common substitute for dower. From this practice came the familiar but rather unmeaning phrase in the Anglican marriage service: "With all my worldly goods I thee endow."[36]

§ 105. *B. Common law jointure.* Jointure is defined by Coke, followed by Blackstone,[37] to be "a competent livelihood of freehold for the wife, of land and tenements, to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least."[38]

"These four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur auter vie,* or for any term of years or other smaller estate. 3. It must be made to herself, and to no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it."[39]

In the definition of jointure given by Coke and Blackstone the assent of the future wife is not stated as an essential element; whether such assent was necessary, if the jointure

35—2 Bl. Comm. 132-135.

36—2 Bl. Comm. 134, note p.

37—Co. Litt., 36 B.; Vernon's Case, 4 Coke Rep. 2; 2 Bl. Comm. 137.

38—It is commonly regarded as a common law estate, but really rested on the terms of the Statute of Uses, 27 Henry VIII, Ch. 10, as pointed out by Blackstone; but as that statute antedated the earliest American settlements, it was a part of the body of existing English law brought to America by our first colonists. Hastings v. Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Bigelow v. Hubbard, 97 Mass. 195; Gelzer v. Gelzer, Bailey's Eq. (S. C.) 387, 23 Am. Dec. 180.

39—2 Bl. Comm. 138; **Saunders v. Saunders, 144 Mo. 482.**

were found to have made a competent provision for the wife's support, was an unsettled question until the case of the Earl of Buckingham v. Drury, decided in the House of Lords in 1672, when it was decided by a divided court, Lords Hardwick and Mansfield being in the majority, that the jointure depends for its validity on the sufficiency of the provision made, and not on the assent of the wife, and therefore that it is binding upon her, if found to be adequate, though she were then an infant and incapable of binding herself by a contract.[40]

§ 106. *C. Equitable or statutory jointure.* It has already been pointed out in a previous chapter that a husband and wife might make a contract before marriage for the adjustment of their property rights, which, if it were fair and reasonable, and made without either party taking any unjust advantage of the other, would be carried out in equity. A frequent element in such agreement is a provision that the wife shall claim or have no dower in the event of surviving her husband, and such provision for the substitution of other benefits for dower is sometimes called an equitable jointure; it differs from the legal jointure in that the estate or other advantage, which the wife receives, need

40—Earl of Buckingham v. Drury (often cited as Drury v. Drury), 5 Brown's Par. Cas. 570, also reported in 2 Eden 39, 60, and in 4 Brown's Ch. Cas. 506, note. The opinion is also given in full in 8 Wend (N. Y.) 297, note.

This decision was followed very reluctantly in New York: McCartee v. Teller, 8 Wend. (N. Y.) 267, 289; Temple v. Hawley, 1 Sandf. Ch. 153; but it has now been established in many states that the wife has her election after the husband's death to claim her dower or to keep her jointure, unless it was assented to by her before the marriage. See, for instance, Revised Laws, Mass., (1902) Ch. 132, § 6; Real Property Law (N. Y.), § 197; Glase v. Davis, 118 Ind. 593.

In Shaw v. Boyd, 5 S. & R. (Pa.) 309, 9 Am. Dec. 368, it was held that an equitable jointure, that is, a substitution of personal property for dower by ante-nuptial agreement, was of no effect if the wife was a minor, both when the agreement was made and when, after her husband's death, she received the stipulated benefits.

not be the precise legal interest in real estate required for a legal jointure, but may be personal property, or even the relinquishment of the husband's right in her property.[41] So also the substitutes for dower, or for the statutory right of the wife which replaces dower, often provided by our modern statutes, are sometimes spoken of as jointures, though not within the technical definition of the common law term.[42]

§ 107. *D. Testamentary provision in lieu of dower.* As already stated, the husband can not bar his wife of dower by his will. If by the terms of his will he gives her a devise or bequest in lieu of her dower, this constitutes really an offer to her; she can refuse it and claim her dower; but if she accepts it, she must take it on the condition on which it was given, and surrender her right to dower.[43] But if

41—4 Kent's Comm. 55; **Rieger v. Schaible, 81 Neb. 33, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700;** Kennedy v. Kennedy, 150 Ind. 636; Andrews v. Andrews, 8 Conn. 79; Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Bigelow v. Hubbard, 97 Mass. 195; Vincent v. Spooner, 2 Cush. (Mass.) 467; Freeland v. Freeland, 128 Mass. 509; Hannon v. Hannon, 46 Mont. 253, Ann. Cas. 1914 D 616; Cowdrey v. Cowdrey, 72 N. J. Eq. 951; O'Brien v. Elliott, 15 Me. 125, 32 Am. Dec. 137; Moran v. Stewart, 173 Mo. 207; Murphy v. Murphy, 12 Ohio St. 407; Cummings v. Cummings, 25 R. I. 528; Chaffee v. Chaffee, 70 Vt. 231.

42—4 Kent's Comm. 56; Glase v. Davis, 118 Ind. 593; General Statutes of Connecticut, 1918, § 5050, 5054; Chaffee v. Chaffee, 70 Vt. 231; Bayes v. Howes, 113 Ky. 465; King v. King, 184 Mo. 99; Hinkle v. Hinkle, 34 W. Va. 142; Under the liberal modern doctrine as to the right of a wife to contract with her husband during the marriage (see *ante*, § 92), she may also by a post-nuptial agreement bind herself to release her dower before the death of the husband, and a fair conscionable agreement of that nature will be enforced against her in equity. Jones v. Fleming, 104 N. Y. 418; Hill v. Boland, 125 Md. 113, Ann. Cas. 1917 A 46 and full note. And see generally the cases cited in the notes to § 92.

43—4 Kent's Comm. 58; Reed v. Dickerman, 12 Pick. (Mass.) 146; Griggs v. Veghte, 47 N. J. Eq. 180; Vanorden v. Vanorden, 10 Johns. (N. Y.) 30, 6 Am. Dec. 314; Wilson's Appeal, 137 Pa. St. 621, 21 Am. St. Rep. 901.

As to whether the guardian of

he gives her an estate by will, and does not, either expressly or by clear implication, make it conditional on her releasing dower, she may take both; the devise or bequest is interpreted as an addition to the rights secured to her by the law.[44]

Whether a legacy or devise is in lieu of dower, and puts the widow to her election, depends on the intention of the testator; and this intention, in the absence of any express terms excluding dower, is to be gathered from all parts of the will. The presumption is that the gift is unconditional, and that the wife can accept it without relinquishing her dower.[45] The intention to make the bequest in lieu of dower may be shown by implication; but the implication must be clear and manifest.[46] But where the provision for the

an insane widow can make this election for her, see *post*, § 160, notes 34 and 35.

44—**Church v. Bull, 2 Denio (N. Y.) 430, 43 Am. Dec. 754;** Thompson v. Betts, 74 Conn. 576, 92 Am. St. Rep. 235; Reed v. Dickerman, 12 Pick. (Mass.) 146; Cowdrey v. Cowdrey, 72 N. J. Eq. 951; Adsit v. Adsit, 2 Johns. Ch. (N. Y.) 448, 7 Am. Dec. 539; Evans v. Webb, 1 Yeates (Pa.) 424, 1 Am. Dec. 308.

45—Lord v. Lord, 23 Conn. 327; Horstmann v. Flege, 172 N. Y. 381; Garrett v. Vaughn, 59 S. C. 516.

By statute in some jurisdictions the presumption is reversed, and the bequest is presumed to be in lieu of dower unless an intent to give an additional benefit clearly appears. Reed v. Dickerman, 12 Pick. (Mass.) 146; Warren v. Warren, 148 Ill. 641; Sanders v. Wallace, 118 Ala. 418; Bayes v. Howes, 113 Ky. 465; Stearns v. Perrin, 130 Mich. 456; McKee v. Stuckey, 181 Mo. 719.

46—It is the settled rule of law "that to compel the widow to elect between the dower and a provision made for her in the will, where the testator had not in terms declared his intention on the subject, it was not sufficient that the will rendered it doubtful whether he intended that she should have her dower in addition to that provision; but that to deprive her of dower, the terms and provisions of the will must be totally inconsistent with her claim of dower in the property * * * so that the intention of the testator in relation to some part of the property devised to others would be defeated if such claim should be allowed." Church v. Bull, 2 Denio (N. Y.) 430, 43 Am. Dec. 754.

Re Hatch's Estate, 62 Vt. 300, 22 Am. St. Rep. 109; Bennett v. Packer, 70 Conn. 357, 66 Am. St. Rep. 112; Warner v. Hamill, 134 Iowa 279; Jackson v. Churchill, 7

widow made by the will much exceeds her statutory share, and to permit her to receive both would defeat the provisions made for other beneficiaries by the will, she will be put to her election.[47]

The inference that a bequest or devise is intended to be in lieu of dower may arise from the bequest itself, as if the will should give her half of all his estate for life, or from other parts of the will in which he makes other dispositions which are evidently inconsistent with her taking dower.

If a widow takes a devise or legacy in lieu of dower, she is regarded, as to such provision, as a purchaser rather than a gratuitous beneficiary; her interest is preferred to that of other legatees, and will not abate in case of deficiency of assets to pay all the legacies.[48]

Cow. (N. Y.) 287, 17 Am. Dec. 514; Kovalinka v. Schlegel, 104 N. Y. 125, 58 Am. Rep. 494; Gordon v. Stevens, 2 Hill Eq. (S. C.) 46, 27 Am. Dec. 445; Pickett v. Peay, 3 Brev. (S. C.) 545, 6 Am. Dec. 594; Higginbotham v. Cornwell, 8 Gratt. (Va.) 83, 56 Am. Dec. 130.

47—Re Purcell, 25 R. I. 553; Lord v. Lord, 23 Conn. 327; Re Zahrt, 94 N. Y. 605; Re Gordon, 172 N. Y. 25, 92 Am. St. Rep. 689; Griggs v. Veghte, 47 N. J. Eq. 180; Helme v. Strater, 52 N. J. Eq. 599; Re Gotzian, 34 Minn. 159, 57 Am. Rep. 43; McKee v. Stuckey, 181 Mo. 719; White v. White, 16 N. J. L. 202, 31 Am. Dec. 232.

In Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706, a devise and bequest of all the testator's real and personal estate to his widow for life was held not to be in lieu of dower, testator having sold real estate in which the dower right would exceed in value a life estate in what he retained.

48—**Moore v. Alden, 80 Me. 301, 6 Am. St. Rep. 203;** Security Co. v. Bryant, 52 Conn. 311, 52 Am. Rep. 599; Clayton v. Aiken, 38 Ga. 320, 95 Am. Dec. 393; Tollard v. Tollard, 1 Allen (Mass.) 490; Howard v. Francis, 30 N. J. Eq. 444; Walker's Appeal, 175 Pa. St. 60; Overton v. Lea, 108 Tenn. 505.

The bequest of a specific sum in lieu of dower is always to be construed as if the words, "to be paid in full in preference to all other legacies," were added. A provision that "if any estate shall not be sufficient to pay in full the aforesaid legacies, then the devise to my wife and to A shall be paid first, in full, and the other devises pro rata," does not take away the preference of the widow over A, and her legacy will be paid in full before A receives anything. Security Co. v. Bryant, 52 Conn. 311, 52 Am. Rep. 599.

Not only will general legacies be abated, if needed to satisfy a

§ 108. *E. Divorce or elopement of the wife.* As early as 1285 Parliament enacted that if a wife eloped from her husband and lived with an adulterer, she should be barred of her dower.[49] A divorce *a vinculo,* which at the common law was only effected by special act of Parliament, was also regarded as putting an end to dower; since one could not be the widow of a man at his death if she had during his life ceased to be his wife.[50] In some of the American states the rule of the Statute of Westminster is in force, either by its adoption as a part of the common law or by re-enactment.[51] In others such misconduct on the part of the wife is not *per se* a bar to dower. The greater ease of divorce proceedings in modern times makes that the appropriate mode of redress for a husband whose wife has grossly mis-

bequest in lieu of dower, but also specific legacies, and specific devises of land. Borden v. Jenks, 140 Mass. 562, 54 Am. Rep. 507.

"The weight of authority holds that she is a purchaser, so far as to have a prior right over all other legatees and devisees; but that her claim must yield to that of creditors." Steele v. Steele, 64 Ala. 438, 38 Am. Rep. 15. On the other hand, in Hall's case, 1 Bland (Md.) 208, 17 Am. Dec. 275, it is held that her legacy is preferred even to the claims of creditors, to the extent of the value of her dower.

49—The Statute of Westminster, 13 Ed. I, Ch. 34; 2 Bl. Comm. 130; 4 Kent's Comm. 52.

50—"*Ubi nullum matrimonium, ibi nulla dos.*" 2 Bl. Comm. 130; 4 Kent's Comm. 54.

51—So the first statute conferring dower in Connecticut imposed the condition that the wife should be "living with her husband in this Colony, or otherwise absent from him with his consent, or through his mere default or inevitable Providence, or in case of Divorce, where she is the innocent party." Laws of Conn. Colony, 1673, Page 21; Peck on the Law of Husband and Wife in Connecticut, § 120. This qualification still remains, in substance, in the Connecticut law.

Real Property **Law (N. Y.)** § 196.

Payne v. Dotson, 81 Mo. 145, 51 Am. Rep. 225; Bell v. Nealy, 1 Bailey L. (N. C.) 312, 19 Am. Dec. 686; Daniels v. Taylor, 76 C. C. A. 139, 7 Ann. Cas. 352, stating the law of Arkansas and the Indian Territory; Sargent v. North Cumberland Mfg. Co., 112 Ky. 888; Phillips v. Wiseman, 131 N. C. 402; Reel v. Elder, 62 Pa. St. 308, 1 Am. Rep. 414; Beaty v. Richardson, 56 S. C. 173, 46 L. R. A. 517.

behaved, and who desires release from his marital obligations.[52]

The common law rule that divorce *ex proprio vigore* puts an end to the wife's dower right is in force in the United States, except where it has been altered by statute.[53] But in many of the states statutes have been passed preserving to the wife her right of dower, if she has obtained the divorce for the misconduct of the husband.[54] Extraordinary

52—Bryan v. Batcheller, 6 R. I. 543, 78 Am. Dec. 454; Lakin v. Lakin, 2 Allen (Mass.) 45; Grover v. Clements, 71 Ark. 565, 100 Am. St. Rep. 91; Littlefield v. Paul, 69 Me. 527; Norton v. Tufts, 19 Utah 470. See Schiffer v. Cruden, 64 N. Y. 47.

53—**Wood v. Wood, 59 Ark. 441, 43 Am. St. Rep. 42, 28 L. R. A. 157;** Barrett v. Failing, 111 U. S. 523; Fletcher v. Monroe, 145 Ind. 56; Marvin v. Marvin, 59 Iowa 699; Hatch v. Small, 61 Kan. 242; O'Malley v. O'Malley, 46 Mont. 549, Ann. Cas. 1914 B 662 and note; Pullen v. Pullen, 52 N. J. Eq. 9; Allen v. Austin, 21 R. I. 254; Cralle v. Cralle, 79 Va. 182.

It has been decided in New York that if a marriage has been annulled because of the existence of a prior wife, the second wife cannot claim dower; although the annulment was under the "Enoch Arden Law" (see *ante*, § 38, note 22), by which the second marriage continued in force until annulled, the children were legitimated, and the parties not guilty of bigamy. Price v. Price, 124 N. Y. 589, 12 L. R. A. 359.

As to the effect of a foreign divorce on (a) prospective and (b) vested dower rights, see Van Blaricum v. Larson, 205 N. Y. 355, 41 L. R. A. (N. S.) 219 and note, Ann. Cas. 1913 E 553 and note.

54—See the terms of the Connecticut Act of 1673, quoted in note 51. Stilson v. Stilson, 46 Conn. 15; **Wait v. Wait, 4 N. Y. 95;** Stahl v. Stahl, 114 Ill. 375; Lakin v. Lakin, 2 Allen (Mass.) 45; Saunders v. Saunders, 144 Mo. 482; Julier v. Julier, 62 Ohio St. 90, 78 Am. St. Rep. 697.

In Michigan, if a divorce is granted to the wife for the husband's fault, the wife is at once entitled to take possession of her dower, as if the husband were dead. Percival v. Percival, 56 Mich. 297. So also in Nebraska; Tatro v. Tatro, 18 Neb. 395, 53 Am. Rep. 820; and in Minnesota; Keith v. Mellenthin, 92 Minn. 537, 104 Am. St. Rep. 679.

In New York a distinction is made between dower, the right to which is inchoate during the marriage, and the right to inherit a share of the husband's property, which springs up at his death; and a divorce even for the husband's adultery is held to bar the latter right. Re Ensign, 103 N. Y. 284, 57 Am. Rep. 717.

complications have occasionally arisen in case of divorce for the husband's fault followed by his remarriage.[55]

Even where the divorced wife would otherwise retain her dower, if alimony is awarded and paid, that bars dower; the award of alimony being a final adjustment of the property rights of the wife.[56]

§ 109. The rights of the wife. ***B.*** ***Her right of succes-***

55—In Brown's Appeal, 72 Conn. 148, 49 L. R. A. 144, an extraordinary state of things led to an interesting decision. One Brown had successively married two women and been divorced from each for his own fault, and then married a third, and died, leaving her surviving. Each of the three "widows" claimed dower; and the claim of the two divorced wives was supported by the plain language of the statute (see note 51). But the court held that when the law permits a divorced man to remarry it necessarily intends that all marital relations between himself and the divorced wife shall be at an end; that he cannot have two wives or leave two widows (still less three); and that this necessary implication of the law will prevail over the letter of the statute relating to dower. The last wife was held therefore to be the only widow, and the only dowress.

In McCraney v. McCraney, 5 Iowa 232, 68 Am. Dec. 702, the divorce was for the wife's fault, and the husband re-married. The first wife then obtained a divorce modifying the divorce judgment so far only as to restore her right of dower and of succession. "Such a decree is, we think, both logically and legally inconsistent, and cannot be supported either upon principle or authority. There cannot be two widows lawfully entitled to dower, any more than there can be two wives legally entitled to the support, care, protection and name of the husband."

On the other hand it was held under circumstances similar to those existing in Brown's Appeal, there being however two wives instead of three, that the first wife retained her dower, and the second also took dower, subject to the prior incumbrance of the first dower. Stahl v. Stahl, 114 Ill. 375.

56—**Adams v. Story, 135 Ill. 448, 25 Am. St. Rep. 392, 11 L. R. A. 790;** Tatro v. Tatro, 18 Neb. 395, 53 Am. Rep. 820; Julier v, Julier, 62 Ohio St. 90, 78 Am. St. Rep. 697 (but see DeWitt v. DeWitt, 67 Ohio St. 340); Gallager v. Gallager, 101 Wis. 202; Harris v. Davis, 115 Ga. 950. In Chicago Title Co. v. Danforth, 236 Ill. 554, 19 L. R. A. (N. S.) 386, the same rule is applied to the divorced wife's claim to a sum which had been agreed upon as a substitute for dower by an antenuptial agreement.

sion in his personal property. By a statute of the reign of Charles II (1671) it was provided that the wife should have one-third of her husband's personal property at his death, or one-half if there were no children.[57] This same rule has been so generally adopted that it may fairly be called the American common law; though it rests upon express statutes in each jurisdiction.

But this interest differs from dower in that it is a mere right of inheritance. It takes effect only in the intestate estate left by the husband after payment of his debts; and is therefore subject to be defeated, either by the husband's debts, or by the legacies given in his will.[58] And a gift by the husband of a large part or of the whole of his personal property on the eve of his death, by which his wife loses her expected portion, is usually held to be valid and effective against her if it was an actual and *bona fide* gift, and free from any other fraud than the intention to defeat the wife's succession.[59]

57—2 Bl. Comm. 515; 2 Kent's Comm. 421.

58—Robertson v. Robertson, 147 Ala. 311, 3 L. R. A. (N. S.) 774, 10 Ann. Cas. 1051; Holmes v. Holmes, 3 Paige Ch. (N. Y.) 363; Re Ensign, 103 N. Y. 284, 67 Am. Rep. 717. At the ancient common law the wife was entitled to the same portion of her husband's personal estate, as her *pars rationabilis*, which he could not take from her by his will. 2 Bl. Comm. 492, 493. And in Maryland this ancient rule has been followed from the earliest times. Griffith v. Griffith, 4 Harris & McH. (Md.) 101, (1793); Coombs v. Clements, 4 Harris & J. (Md.) 480; Hays v. Henry, 1 Md. Ch. 337.

59—"Some courts have gone to the extent of declaring that a wife, because she is a wife, has a tangible and valuable interest in her husband's estate springing from the marriage itself, which the law recognizes and protects, and that a voluntary gift by the husband to a third party may be a fraud upon that interest, and upon her claim to a distributive share. But the almost overwhelming weight of authority is to the contrary. And we think that by that weight of authority the rule is established that the law places no restriction or limitation on the power of the husband to make such disposition by gift, voluntary conveyance, or otherwise, of his personal property during his lifetime as he may wish, even though his wife is thereby deprived of the distributive share therein which

This right, like that of dower, is often barred by antenuptial or post-nuptial agreements, by which some other advantage is given to the wife in consideration of her abandonment of her right of succession; and such agreements, if reasonable and fairly made, are commonly held valid and binding.[60]

would otherwise fall to her upon his death. He may by gift dispose of his personal property absolutely, without the concurrence and against the will of his wife, exonerated from all claim by her, provided the transaction is not merely colorable, and is unattended by facts indicative of some other fraud upon her than that arising from his absolute transfer to prevent her having an interest therein after his death. To hold that a wife has a vested interest in her husband's vested estate, that he is unable to divest in his lifetime, would be disastrous to trade and commerce." **Wright v. Holmes, 100 Me. 508, 3 L. R. A. (N. S.) 769, 4 Ann. Cas. 583.**

Other cases in which ante mortem gifts are sustained against the claims of the wife are Robertson v. Robertson, 147 Ala. 311, 3 L. R. A. (N. S.) 774, 10 Ann. Cas. 1051; Lines v. Lines, 142 Pa. St. 149, 24 Am. St. Rep. 487; Cranson v. Cranson, 4 Mich. 230, 66 Am. Dec. 534; Holmes v. Holmes, 3 Paige Ch. (N. Y.) 363; Cameron v. Cameron, 10 Sm. & M. (Miss.) 394, 48 Am. Dec. 759; Hays v. Henry, 1 Md. Ch. 337; Samson v. Samson, 67 Iowa 253; Small v. Small, 56 Kan. 1, 54 Am. St. Rep. 581, 30 L. R. A. 243; Trabbic v. Trabbic, 142 Mich. 387. But a gift *causa mortis*, to take effect only from the husband's death, is testamentary in its nature, and the widow's right of succession prevails over it. Hatcher v. Buford, 60 Ark. 169, 27 L. R. A. 507.

In the following cases such gifts have been held invalid in favor of the wife on particular circumstances existing in the particular case: Brown v. Crafts, 98 Me. 40; Leonard v. Leonard, 181 Mass. 458, 92 Am. St. Rep. 426; Walker v. Walker, 66 N. H. 390, 49 Am. St. Rep. 616, 27 L. R. A. 799; Re Hummel, 161 Pa. St. 215; Nichols v. Nichols, 61 Vt. 426.

Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211; Manikee v. Beard, 85 Ky. 20; Murray v. Murray, 90 Ky. 1, 8 L. R. A. 95; and Smith v. Smith, 22 Col. 480, 55 Am. St. Rep. 142, 34 L. R. A. 49, seem to hold the mere fact that a gift was intended to prevent the wife's succession sufficient to make it voidable by her.

60—Staub's Appeal, 66 Conn. 127; Paine v. Hollister, 139 Mass. 144; McNutt v. McNutt, 116 Ind. 545, 2 L. R. A. 372; Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Young v. Hicks, 92 N. Y. 235; Ditson v. Ditson, 85 Ohio 276; Hafer v. Hafer, 33 Kan. 449. And see the cases cited in ch. XIII,

There is a strongly marked tendency in modern legislation to abolish both dower and the above defined right of succession, to make the right of the surviving husband or wife to the other's property identical, and also to abolish all distinctions between real and personal property as to the rights of marital succession therein. Under these statutes, the wife's right of succession, like her dower at the common law, is commonly made superior to the husband's testamentary power; but it may be barred by her acceptance of a testamentary provision, which by express provision or by clear implication is given in lieu of such statutory share.[61]

§ 110. Quarantine, paraphernalia, and the widow's allowance. Other special rights of the widow in her husband's estate are her "quarantine," a right of remaining in the family mansion for forty days after her husband's death, during which time her dower was to be assigned to her,[62] which has been replaced in American probate law by her right to occupy the family home during the settlement of the estate or for a reasonable time; her "paraphernalia," that is, her clothing and jewels, which, while they are the husband's property during the marriage at common law, become hers at his death, unless needed to pay his debts;[63] and the right of the widow, universal in the United States, though depending on the terms of the various statutes, to a reasonable allowance for her support during the settle-

notes 3-7, 11-12. *Contra*, under the older law, Sullings v. Richmond, 5 Allen (Mass.) 187, 87 Am. Dec. 742.

61—As to bequests in lieu of the widow's right of succession, see Grant v. Stimpson, 79 Conn. 617; Shipman v. Keyes, 127 Ind. 353. See also the cases cited in notes 44 to 47, in many of which the wife's statutory share of personal property was barred by the will together with dower.

62—2 Bl. Comm. 135.

63—2 Bl. Comm. 435; Howard v. Menifee, 5 Ark. 668; Rawson v. Penn. Railway Co., 48 N. Y. 212, 8 Am. Dec. 543; Whiton v. Snyder, 88 N. Y. 299; Farrow v. Farrow, 72 N. J. Eq. 421. And see, *ante*, § 70.

ment of the husband's estate, which takes precedence even of his debts.[64]

64—That even the widow's allowance might be barred by antenuptial contract, see *ante*, § 91, note 3.

CHAPTER XV

THE EQUITABLE DOCTRINE OF THE MARRIED WOMAN'S SOLE AND SEPARATE ESTATE.

§ 111. The two great modes of reform: first equitable, later statutory. In the last four chapters we have considered the common law system of property rights of husband and wife.

It has already been pointed out that this system ceased to satisfy the sense of justice of the English and American people more than a century ago, and that first the courts of equity, in a timid and partial way, and afterward the legislatures, proceeding sometimes cautiously and by short steps and sometimes more rapidly and radically, effected what has finally come to be an almost complete revolution in the law of the married woman's property rights.

It is necessary to now state the method and broad results of these reforms. It is impossible to state the existing law in detail; because it rests upon the statutes and decisions of each state, and differs very greatly in detail. One can ascertain the exact present law of any jurisdiction only by a careful study of its statutes and judicial decisions.

Up to the middle of the nineteenth century the courts of equity were the principal instruments of reform; at that time the process of statutory reform began. The more comprehensive reform which has been effected by legislation, and so has become a part of the strict law, has made the equitable system less important and in many states practically obsolete. But it is often of practical importance today; and it is of great historical interest, since it was by the equity courts that the ancient common law system was first broken into and liberalized, and the equity

rules became the basis of most of the early and some of the recent legislation.

§ 112. **The rise of the equitable doctrine.** Several steps may be readily distinguished in the development of the wife's equitable estate. In the first place, by the ingenuity of family solicitors, estates which a father wished to bestow upon his married daughter, but which he was not willing to have pass to the ownership or control of her husband, were conveyed to some third party in trust for her separate use and benefit. Thus no legal title was vested in her so as to pass to the husband, and the courts of chancery, by their general power over trusts, could compel the trustee to carry out the trust and use or pay over the proceeds for her sole use and benefit.

But, secondly, if the estate was conveyed to a married woman, and the grant was clearly expressed to be for her sole and separate use, free from any interest or control of the husband, though the legal title passed to the husband, equity held him to be a trustee for the wife's separate use.[1]

1—Among early English cases, it may be sufficient to cite Rolfe v. Budder, Bunb. 187 (1724); Standford v. Marshall, 2 Atk. 69 (1740); Darley v. Darley, 3 Atk. 399 (1746); Hearle v. Greenbank, 3 Atk. 695 (1749); Hulme v. Tennant, 1 Bro. Ch. 16 (1778); Dimmock v. Atkinson, 3 Bro. Ch. 195 (1790).

This title was at first usually created by conveyance to a trustee for the wife's use; but it was early held that this was not necessary, and that a good equitable estate to her sole and separate use might be created by conveyance directly to the wife, if the language showed a clear intent to exclude the husband's marital rights. Rolfe v. Budder, Bunb. 187 (1724); Darley v. Darley, 3 Atk. 399 (1746); Peacock v. Monk, 2 Ves. 190 (1751); Lee v. Prieaux, 3 Bro. Ch. 381 (1791). In Harvey v. Harvey, 1 P. Wms. 125 (1710), the Lord Chancellor left the question unsettled whether a sole and separate estate in personal property could be created except by means of a trust, saying: "the intention being repugnant to the rules of law: viz., that a feme covert should have property in personal goods, it seems to me to have some difficulty in it." But in Bennett v. Davis, 2 P. Wms. 316 (1725), the Master of the

And at a later time when equity had come to recognize ante-nuptial or post-nuptial agreements between husband and wife, and to sanction gifts from husband to wife,[2] it extended its jurisdiction over the estates thus vested in married women, and which the courts of law did not recognize.

The property vested in the wife by any of the above methods came to be an important subject of equity jurisprudence, and was technically known as her "sole and separate estate."[3]

§ 113. The creation of the sole and separate estate. If the will, conveyance or gift, by which the property came to the wife, was that of a third person, it must clearly appear by its terms that the grant was of a sole and separate estate; otherwise it was treated as conveying to her an ordinary title, to which the husband's marital rights immediately attached.[4] The most clear and unmistakable in-

Rolls "took it to be a clear case that it was a trust in the husband."

Among early American cases may be cited Riley v. Riley, 25 Conn. 154; Carroll v. Lee, 3 Gill. & J. (Md.) 504, 22 Am. Dec. 350; Wood v. Wood, 83 N. Y. 575; Hamilton v. Bishop, 8 Yerg. (Tenn.) 33, 29 Am. Dec. 101.

2—See *ante*, § 95, note 32.

3—Story on Equity Jur., §§ 1378-80; 2 Kent's Com., §§ 162-164; 2 Bl. Comm., Cooley's ed., 293, note 3. The doctrine of sole and separate estate had not become prominent enough in Blackstone's day to merit his attention; and doubtless that great commentator saw little occasion for reform in the common law of England which he venerated so deeply.

Deming v. Williams, 26 Conn. 226, 68 Am. Dec. 386; Botts v. Gooch, 97 Mo. 88, 10 Am. St. Rep. 286; Castree v. Shotwell, 73 N. J. Eq. 590; Re Quinn, 144 Pa. St. 444.

4—"An equitable separate estate can only exist, with the qualifications hereinafter noticed, when it is made such in the grant of the title, by the use of unequivocal words showing an intent in the grantor to exclude the marital rights of the husband; such as the words 'to her sole and separate use,' or other words of like import. If such words are not used, the title will pass to the married woman, but the use will go to her husband under the rules of the common law. In other words, inasmuch as a grant in general terms to a wife at common law conveyed to her the title, and her husband, *jure uxoris*, at once be-

dication of the grantor's intention is by placing the property in trust; but a conveyance expressed to be "to her sole and separate use," or to be "free from any right or control of her husband," or one containing any similar language, which clearly shows the intention to exclude the husband's rights, is sufficient to create a sole and separate estate in the wife.[5]

If the conveyance be from the husband, different considerations enter into the interpretation of the grant; a gift of personal property from the husband to the wife is necessarily interpreted as being to her sole and separate use, since otherwise the entire title would at once revert to the husband, and the gift be rendered a nullity.[6] The same rule is applied by the majority of courts to conveyances of real estate by the husband to the wife (made, of course, through a third person) without restrictive words, although the presumption is not so clear as in the case of personal estate, since a husband might possibly desire to give to his

came seised of the use, in order to create an equitable separate estate in the wife it must appear from the terms of the grant that the grantor intended that the wife should take both the title and use. The intent to exclude the marital rights of the husband must be clear and certain. * * * As there are no words in the will signifying an intent to exclude the husband's common law rights to this property, it is clear that the defendant had no separate estate under said will." Hubbard v. Bugbee, 58 Vt. 172.

Vail v. Vail, 49 Conn. 52; Richardson v. De Giverville, 107 Mo. 422, 28 Am. St. Rep. 426.

5—**Meacham v. Bunting, 156 Ill. 586, 47 Am. St. Rep. 239;** McMillan v. Peacock, 57 Ala. 127; Jarvis v. Prentice, 19 Conn. 272; Richardson v. De Giverville, 107 Mo. 422, 28 Am. St. Rep. 426; Wood v. Wood, 83 N. Y. 575; Nix v. Bradley, 6 Rich. Eq. (S. C.) 43; Martin v. Bell, 9 Rich. Eq. (S. C.) 42, 70 Am. Dec. 200; Hamilton v. Bishop, 8 Yerg. (Tenn.) 33, 29 Am. Dec. 101; Beaufort v. Collier, 6 Humph. (Tenn.) 487, 44 Am. Dec. 321; Travis v. Sitz, 135 Tenn. 156, L. R. A. 1917 A 671; Miller v. Miller, 92 Va. 510.

6—Deming v. Williams, 26 Conn 226, 68 Am. Dec. 386; Johnston v. Johnston, 173 Mo. 91, 96 Am. St Rep. 486, 61 L. R. A. 166; Barnum v. Le Master, 110 Tenn. 638; Fox v. Jones, 1 W. Va. 205, 91 Am. Dec 383.

wife the ultimate fee in land, while still intending to exercise his usual rights of a husband therein.[7]

It is often held, too, that a husband may, by leaving in sole use and control of the wife property in which, by the mode of its acquisition, he would be entitled to the common law rights of the husband, confer on her a sole and separate estate; his failure to exercise his rights operating as an abandonment of them, and an implied gift to his wife.[8]

§ 114. Incidents of the estate. The general rule as to the wife's rights in relation to her sole and separate estate may be briefly stated in the formula: she is, as to such estate, a *feme sole* in the eyes of equity.[9] She can bind it by her contracts,[10] give it away, even to her husband (though a gift to her husband would be scrutinized with

7—McMillan v. Peacock, 57 Ala. 127; Pitts v. Sheriff, 108 Mo. 110; Ball v. Ball, 20 R. I. 520; Barnum v. Le Master, 110 Tenn. 638; Garland v. Pamplin, 32 Gratt. (Va.) 314.

In Hoyt v. Parks, 39 Conn. 357, the Connecticut court held that real estate given by the husband to the wife, by conveyance through a third person, vests in her by an ordinary title subject to the husband's marital rights, the court drawing the distinction suggested in the text.

The same was held as to a deed executed by a third party to the wife, but on the order of the husband and for a consideration paid by him. Mutual Fire Ins. Co. v. Deale, 18 Md. 26, 79 Am. Dec. 673.

8—Botts v. Gooch, 97 Mo. 88, 10 Am. St. Rep. 286; Leslie v. Bell, 73 Ark. 338; Gill v. Woods, 81 Ill. 64, 25 Am. Rep. 264; Beam v. Bridges, 108 N. C. 276, 23 Am. St. Rep. 59.

9—Tullett v. Armstrong, 1 Beav. 1, 21; Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 425; Jacques v. M. E. Church, 17 Johns. (N. Y.) 549, 8 Am. Dec. 447; Garland v. Pamplin, 32 Gratt. (Va.) 314.

But in Pennsylvania the courts have refused to follow the general equitable doctrine, and hold that each such estate is defined by the terms of the grant, and that the wife has no contractual powers in relation to the property except such as are expressly conferred upon her. Halliday v. Hively, 198 Pa. St. 335. So also in South Carolina; Nix v. Bradley, 6 Rich. Eq. (S. C.) 43.

10—Richardson v. De Giverville, 107 Mo. 422, 28 Am. St. Rep. 426; Garland v. Pamplin, 32 Gratt. (Va.) 314.

great care and suspicion to make it certain that no unfair advantage had been taken of her, nor marital pressure exerted upon her),[11] and she may convey it by the usual mode of conveyance, unless the statutes prescribe a particular mode of conveyance by married women, as they commonly do in relation to real estate,[12] or by her will.[13]

As to the liability of a married woman's sole and separate estate for her debts, and the method in which she may bind it by her contracts, there are two quite different rules. It was held in the earlier English cases, which have been followed in a few American courts, that a married woman who owned sole and separate estate was thereby endowed, so far as liability of that estate in equity is concerned, with the general power of making contracts and incurring debts; and therefore that any debt contracted by her can be collected by equitable process from that estate.[14]

The other doctrine is that her power to bind her sole and separate estate is a limited one, and is confined to contracts which in terms or by implication relate to, or are charged upon, the estate. If she incurs a debt and expressly agrees that it shall be a charge upon her sole and separate estate, the estate is liable for the debt; if she incurs a debt in relation to her sole and separate estate, as in buying,

11—Comstock's Appeal, 55 Conn. 214.

12—Tullett v. Armstrong, 1 Beav. 1, 22; Pitts v. Sheriff, 108 Mo. 110; Jacques v. M. E. Church, 17 Johns. (N. Y.) 549, 8 Am. Dec. 447; Garland v. Pamplin, 32 Gratt. (Va.) 314.

13—Peacock v. Monk, 2 Ves. 190 (1751); McKennan v. Phillips, 6 Whart. (Pa.) 571, 37 Am. Dec. 438.

14—"It has been held time and again by this court that the execution of a bond, note or other writing for the payment of money by a married woman having an equitable separate estate, whether as principal or as surety, was sufficient evidence of an intention to charge the separate estate, without any proof of a positive intention to do so or without even a reference to such estate contained in the writing." Miller v. Miller, 92 Va. 510. Radford v. Carwile, 13 W. Va. 572, contains a very full examination of the English and American cases. See also the cases cited at the end of the next note.

adding to or improving such estate, an express charge upon the estate is not necessary; it will be presumed that the credit was given, and might rightfully be given, to the separate estate. But if she make a contract without reference to her separate estate and not in relation to it, or if at the time of making the contract she had no such estate, the contract is invalid for lack of contractual power on her part, and her separate estate can not be subjected to it by implication.

The latter doctrine has become the prevailing and orthodox one.[15]

It must be remembered that since the entire doctrine of sole and separate estate exists in equity only, the proceedings to charge such estate with the wife's debts or con-

15—**Yale v. Dederer, 22 N. Y. 450, 78 Am. Dec. 216 and note;** Ankeny v. Hannon, 147 U. S. 118; Corn Exchange Bank v. Babcock, 42 N. Y. 613, 1 Am. Rep. 601; Willard v. Eastham, 15 Gray (Mass.) 328, 77 Am. Dec. 366; Miller v. Newton, 23 Cal. 554; Williams v. Hugunin, 69 Ill. 214, 18 Am. Rep. 607; Kantrowitz v. Prather, 31 Ind. 92, 99 Am. Dec. 599; Reed v. Lamar, 1 Strobh. Eq. (S. C.) 27; Bank v. Lumber Co., 100 Tenn. 479. See the controlling English cases reviewed in Ankeny v. Hannon, *supra*.

It is held in Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 425, that "it is not necessary that she should execute an instrument expressly referring to it, or purporting to execute a power over it. It is sufficient that there is an intention to charge her separate estate, and the contracting of a debt by her during coverture is a presumption of that intention." So it was said in Johnson v. Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142: "In order to bind the separate estate, it must appear that the engagement was made in reference to and upon the faith of credit of the estate. But where a married woman living apart from her husband, and having a separate estate, contracts debts, the court will impute to her the intention of dealing with her separate estate unless the contrary is shown." **Phillips v. Graves, 20 Ohio St. 371, 5 Am. Rep. 675,** and Williams v. Urmston, 35 Ohio St. 296, 35 Am. Rep. 611, state the presumption of the wife's intention to charge her separate estate in contracting a debt so strongly as to practically give her the general power of contracting, and to make her separate estate liable for all her debts.

tracts must be in equity, and are in the nature of a proceeding to enforce a lien upon the property in question.[16]

It is inherent in the very theory and purpose of the wife's sole and separate estate that the husband has no interest therein, nor any power over it, during the marriage; he can not sell or use it; it can not be taken for his debts nor bound by his contracts. But, unless his right of curtesy in her real estate and of succession to her personal property is expressly taken away by the terms of the instrument by which the estate is created, the peculiar nature of the estate ceases at the wife's death, and he is entitled to his usual rights as a surviving husband.[17]

§ 115. The effect of the doctrine of sole and separate estate on modern legislation. When legislation began to be enacted by which the wife's property was placed in her own control, and the husband's common law rights were abolished or restricted, the legislatures and courts in many cases availed themselves of the existing doctrine of sole and

16—**Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 425;** Miller v. Newton, 23 Cal. 554; Johnson v. Cummins, 16 N. J. Eq, 97, 84 Am. Dec. 142.

17—**Neeley v. Lancaster, 47 Ark. 175, 58 Am. Rep. 752;** Appleton v. Rowley, L. R. 8 Eq. 139; Meacham v. Bunting, 156 Ill. 586, 47 Am. St. Rep. 239; Cooney v. Woodburn, 33 Md. 320; McBreen v. McBreen, 154 Mo. 323, 77 Am. St. Rep. 758; Cushing v. Blake, 30 N. J. Eq. 689; Rank v. Rank, 120 Pa. St. 191; Ball v. Ball, 20 R. I. 520; Carter v. Dale, 3 Lea (Tenn.) 710, 31 Am. Rep. 660.

Contra. "His marital rights never having attached to this property during Mrs. G's life by reason of the words of exclusion in Dr. M's will, they cannot, under our rulings, attach after her death." Grimball v. Patton, 70 Ala. 626.

With this agree Nicrosi v. Phillipi, 91 Ala. 299, 307; Haight v. Hall, 74 Wis. 152, 17 Am. St. Rep. 122. See also McCulloch v. Valentine, 24 Neb. 215.

It is said in Mullany v. Mullany, 4 N. J. Eq. 16, 31 Am. Dec. 238, that "those incidents which by law are inseparably annexed to an estate cannot be prohibited by any limitations expressed in the deed or will;" and the case holds that the husband's right of curtesy cannot be taken away even by the express terms of the grant. But this extreme view is not supported by the cases generally.

separate estate as a basis for the broader rights which they desired to confer upon married women.

In some cases the legislature expressly declared all the wife's property to be "sole and separate estate,"[18] and in others the courts held that the same result had been effected by the statutes without express words to that effect; consequently the formula that had long prevailed in equity, that the wife is a *feme sole* as to her separate estate, was applied to all her property, and, in equity at least, her full contractual capacity resulted from the abolition of the husband's common law rights.[19]

18—Thus the New York statute of 1848 (laws of 1848, Ch. 200) was as follows: "The real and personal property of any female who may hereafter marry, and which she may own at the time of marriage, and the rents, issues and profits therein, shall not be subject to the disposal of her husband nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female."

See also the Arkansas Statute of 1873, quoted in Neelly v. Lancaster, 47 Ark. 175, 58 Am. Rep. 752.

19—**Spitz's Appeal, 56 Conn. 184, 7 Am. St. Rep. 303;** Corn Exchange Bank v. Babcock, 42 N. Y. 613, 628, 1 Am. Rep. 601; Levi v. Earl, 30 Ohio St. 147, analyzed and followed in Ankeny v. Hannon, 147 U. S. 118; Neelly v. Lancaster, 47 Ark. 175, 58 Am. Rep. 752; Radford v. Cawile, 13 W. Va. 572. 684; Conney v. Smith, 13 Wis. 125.

CHAPTER XVI

MODERN REFORM LEGISLATION.

§ 116. A general survey of nineteenth century legislation. It was said in the previous chapter that the common law had been modified, first by the equitable doctrine of sole and separate estate, and secondly by legislation.

The second half of the nineteenth century saw almost a complete revolution effected in this branch of the law; the general purpose of this legislation was to relieve married women from the hardships of the common law, and its effect has been, in many of the states, to place the wife in a condition of entire independence of and complete equality with her husband in respect to property rights.

During the first half of the nineteenth century there were, in many of the United States, enactments which lessened in some particular detail the common law disabilities of the wife,[1] but about the year 1844 the great flood of legislation began.[2]

1—Mississippi seems to have been the first state to make a substantial change in the rights of married women. By ch. 46 of the Laws of 1839 they were given the right "to become seised or possessed of any property, real or personal—in her own name and as of her own property." The same act gave her especial protection as to property in slaves.

Maryland by ch. 161 of the Laws of 1841, passed March 1st, 1842, exempted the wife's real estate from execution for her husband's debts.

See an article by Henry Hitchcock in the Southern Law Review, volume 6, page 633 (Dec., 1880).

2—The fifth decade of the nineteenth century was a most notable period of law reform. In 1846 the constitution of New York was adopted, which made many important alterations in the law, and which provided for a codification of the entire body of the law, a project which has been more completely accomplished in many other states, who have availed themselves of the work of the New York codifiers, than in New

From 1844 to 1850 statutes were passed in nearly every American state modifying the common law rights of husband and wife; but the reformation proceeded very differently in different states. In some a single comprehensive statute was adopted, while in others the process of change proceeded cautiously by a series of statutes, each reforming some detail of the law.

For instance, the legislature of Connecticut passed twenty statutes in relation to the property rights of husband and wife between 1845 and 1860, and these acts were not grouped into any comprehensive system until the statute revision of 1866;[3] while Michigan, Maine and Rhode Island, by their statutes of 1844, ended at one blow all the rights of the husband in his wife's property, except such as were already vested.[4]

York itself; in 1848 the first New York Code of Civil Procedure was adopted, with its fusion of law and equity, and its abolition of the "forms of action" and many other technicalities of the common law pleading; in 1848 both Connecticut and New York abolished the disqualification of parties and interested persons to testify; in 1852 the first Procedure Act was passed in England, and also a Practice Act in Massachusetts.

These are but samples of the kind of legislation which was actively going on throughout England and America; add to them the acts for the conferring of property rights on married women, and one may realize how extensive and various was the criticism and reformation of the law.

It ought to be said in any discussion of this remarkable period of law reform that it was chiefly the fruitage of the studies and labors of Jeremy Bentham, whose denunciation of many features of the common law, uttered near the end of the eighteenth century, seemed for a long time to have been but "the voice of one crying in the wilderness." See Judge John F. Dillon's account of Bentham's work in Select Essays in Anglo-American Legal History, volume 1, pages 492 to 515.

3—See the author's monograph on The Property Rights of Husband and Wife under the laws of Connecticut (1904), §§ 54 and 62.

4—Michigan Laws of 1844, ch. 66, approved March 11th, 1844; Maine Acts of 1844, ch. 46, approved March 22d, 1844; Rhode Island Revised Laws of 1844, page 290, passed at the January session, 1844, the exact date not stated in the printed Session Laws.

All the New England states except Vermont, and several other states, passed reforming acts of greater or less comprehensiveness between 1844 and 1846.

By 1850 Vermont had joined the general movement, and the great states of New York, Pennsylvania, and several others had taken longer or shorter steps.[5]

It is now the usual rule of law throughout the United States, established in each state by its own statutes, that the wife retains title to the property owned by her before marriage or acquired by her during the marriage, and the right to manage, use, or sell it, without the concurrence of her husband. The right to contract, and to sue and be sued, naturally follows from her ownership and control of her property; in most of the states those rights are expressly conferred by statute; and in some they have been held to result by necessary implication.[6]

The husband is generally relieved from any liability for her debts or for her torts, except for such debts as are for her support or that of the family, or are within her express or implied agency to act for him.[7]

5—The important steps in New York were chapter 200 of the Laws of 1848, which made all the property of a married woman her sole and separate estate, and thereby brought it under the liberal doctrines already established in equity in relation to such estate; ch. 90 of the Laws of 1860, which made her rights of ownership more comprehensive, and gave her qualified and partial rights of contract and suit; ch. 172 of the Laws of 1862, which somewhat broadened the Act of 1860; ch. 384 of the Laws of 1884, which gave her full contractual powers except with her husband; and ch. 594 of the Laws of 1892, which abolished this exception.

6—**Clow v. Chapman, 125 Mo. 101, 46 Am. St. Rep. 468, 26 L. R. A. 412;** Spitz's Appeal, 56 Conn. 184, 7 Am. St. Rep. 303; Kriz v. Peege, 119 Wis. 105.

In many of the states a special rule exists by which she cannot become surety for a debt of her husband. See the note Ann. Cas. 1917 B 597.

As to her power to form a partnership (a) with her husband, and (b) with others, see the note L. R. A. 1916 D 1234-46.

7—It is held in Kies v. Young, 64 Ark. 381, 62 Am. St. Rep. 198; Hetrick v. Hetrick, 13 Ind. 44; Alexander v. Morgan, 31 Ohio St.

The common law estates of dower and curtesy are retained in some of the states, but in the greater number they are materially modified by the statute, or else wholly abolished and replaced by a right of succession to each other's property defined by the statute.

With all the changes of the common law, one element, and perhaps one only, remains unchanged. The duty of the husband to support his wife, originally more than counterbalanced by his right to claim as his own all her personal property, the income of all her real estate, and the proceeds of her labor, remains in full force though all those rights of the husband have become obsolete.[8]

Theoretically, and perhaps in some rare cases actually, injustice may result to the husband from this state of the law; but practically no such oppression of husbands has resulted as to create a demand for legislation for their relief.

§ 117. Personal relations less affected than property rights. It should be noted that this legislative revolution has affected chiefly the property relations of husband and wife. Their personal rights in the marriage relation remain substantially untouched by legislation.[9]

546; Platner v. Patchin, 19 Wis. 333; that the husband is not relieved of his common law liability for the wife's debts by mere implication from statutes which take away his common law rights in her property.

And see the note, Ann. Cas. 1915 C 860.

See full discussion of the question as to his liability for her torts in Kellar v. James, 63 W. Va. 139, 14 L. R. A. (N. S.) 1003 and note; also Henley v. Wilson, 137 Cal. 273, 92 Am. St. Rep. 160, 58 L. R. A. 941; and the other cases cited, *ante*, § 76, notes 49 and 50.

8—In at least one state a corresponding duty has been held to rest upon the wife where she was wealthy, and her husband became infirm and needy. Hagert v. Hagert, 22 N. D. 290, 38 L. R. A. (N. S.) 951, Ann. Cas. 1914 B 925, already cited, § 78, note 62.

9—"The wife is still bound to love and cherish the husband, and to obey him in all reasonable demands not inconsistent with the exercise of her legal rights; to treat him with respect, and regard

But even the personal rights of the husband, and to a greater extent the personal capacities of women, married or unmarried, have undergone a modification which the courts have in many ways recognized and enforced, resulting rather from the general social change in the status of women than from any legislation.[10]

Probably no single detail of the common law subordination of the wife was so bitterly resented, and so difficult to defend, as the vesting in the husband of the sole guardianship over the person of the children. This has been remedied in many states by statutes making the two parents joint guardians of the children, and in case of dispute or separation between them making the welfare of the children the decisive question in fixing their guardianship

him as at least her equal; and he is still bound to protect and maintain her, unless she should neglect wholly her marital duties. * * * These duties and obligations upon husband and wife are not the result of the arrangement of their property at common law, but of the contract of marriage and the relation thereby created. * * * But a line has been drawn between them, distinct and ineffaceable except by legislative power. His legal supremacy is gone and the sceptre has departed from him. She, on the contrary, can have her separate estate, can contract with reference to it, can sue and be sued at law upon the contracts thus made, can sue in her own name for injury to her person and slander of her character, and can enjoy the fruits of her time and labor free from the control or interference of her husband.

The chains of the past have been broken by the progression of the present, and she may now enter upon the stern conflicts of life untrammeled. She no longer clings to and depends upon a man, but has the legal right and aspires to battle with him in the contests of the forum, to outvie him in the healing art, to climb the steps of fame, and to share with him in every occupation. Her brain and hands and tongue are her own." The husband, as a result of these observations, was held not liable for a slander uttered by the wife. Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578.

10—See the decisions recognizing the wife's right to sue a third party for the alienation of her husband's affections, *ante*, § 63, and note 54 thereto; and the recent decisions permitting her to sue her husband for personal violence. *Ante*, § 99.

rather than any priority of right vested in either parent.[11]

And at the present time, when women in most of the states of the Union have been made voters, and a constitutional amendment has been submitted by Congress to the states giving to women universal suffrage, when many women have been appointed and elected to executive and some to judicial office, when in most of the states they are eligible for admission to the bar, and avail themselves of that privilege in constantly increasing numbers, it is evident that any still existing rudiments of the legal inferiority of women, whether married or unmarried, can not long remain.

§ 118. Judicial interpretation of the reform statutes. It is evident that the extent to which married women are emancipated by modern legislation must depend largely upon the mode of interpretation adopted by the courts. The statutes can hardly mention and specifically repeal every rule of the common law; and, if the rule of strict interpretation is followed, married women, while generally emancipated by the broad provisions of the statute, may still lie under many particular disabilities.

In some cases, particularly the earlier ones, the courts, following the well-known rule that statutes in derogation of the common law are to be strictly followed, have held that the effect of the reform statutes could not be extended beyond their terms, or their clear implication, and that the wife remained subject to such disabilities as were not expressly removed by the law.[12]

Accordingly it has been held that the wife can not sue the husband at law and that the rights of property or con-

11—See, *post*, § 130, 146.

12—Schilling v. Darmody, 102 Tenn. 439, 73 Am. St. Rep. 892; Haas v. Shaw, 91 Ind. 384, 46 Am. Rep. 607; Barnett v. Harsbarger, 105 Ind. 410; Smith v. Morgan, 41 Me. 405; Dwelly v. Dwelly, 46 Me. 377; Lord v. Parker, 3 Allen (Mass.) 128.

tract conferred by the statutes can only be enforced against the husband by a bill in equity supported by allegations showing an equitable cause of action;[13] and that the power to make contracts did not include the right to contract with one's husband, if the act were silent in that respect.[14]

While other courts have held that the statutes in relation to married women had effected, not merely an alteration of certain details, but an entire revolution in their status; that whereas they were at common law persons *non sui juris*, having no rights except such as were expressly bestowed upon them, they are now persons *sui juris*, entitled to exercise all rights which the law does not expressly deny to them. Where this rule of interpretation has prevailed the wife has become practically independent of her husband, is equal to him in capacity and legal rights, able to contract with him and to sue him or be sued by him as if they were strangers.[15]

13—See, *ante*, § 99, and notes 51 and 52 thereto.

14—See, *ante*, § 92, and notes 14 and 14 thereto.

15—**Harrington v. Lowe, 73 Kan. 1, 4 L. R. A. (N. S.) 547;** Hageman v. Vanderdoes, 15 Ariz. 312, Ann. Cas. 1915 C 1197 and note, L. R. A. 1915 A 491 and note; Mathewson v. Mathewson, 79 Conn. 23, 5 L. R. A. (N. S.) 611, 6 Ann. Cas. 1027; Clow v. Chapman, 125 Mo. 101, 46 Am. St. Rep. 468, 26 L. R. A. 412; Power v. Lester, 23 N. Y. 527; Flandermeyer v. Cooper, 85 Ohio St. 327, Ann. Cas. 1913 A 983, 40 L. R. A. (N. S.) 360; Begley's Appeal, 60 Pa. St. 418, 100 Am. Dec. 578; Brown v. Brown, 121 N. C. 8, 33 L. R. A. 242; Culmer v. Wilson, 13 Utah 129, 57 Am. St. Rep. 713; Kriz v. Peege, 119 Wis. 105.

"They (the statutes) give her an entirely different standing from that occupied by her at common law. Her position is now more like that of a wife under the civil law. Instead of her legal existence being suspended, as incorporated and consolidated into that of her husband, she is made to stand out in bold relief with a separate and distinct legal existance as to her property and also as to her personal rights; and she may enforce all such rights by proceedings in her own name independently of her husband. She is placed upon an equality with her husband in many and indeed most respects. * * * New rights and new obligations necessarily arise from the changed conditions as incidents thereto. When she is given the sole control of her per-

It must be also recalled, as has already been pointed out,[16] that recognition of rights conferred on married women by newly passed statutes is sometimes limited by the rights already vested in the husband under the preceding state of law; and that if the statutes are prospective in their terms they cannot affect transactions which have already been completed.[17]

The great difference between the statutes of the several

sonal property, and the right to recover the same by her own suit, it must follow as an incident that she has the right to make contracts in respect to such property, though the statute may not in terms give her the right to make contracts in relation thereto. Full dominion over her property carries with it the power to dispose of such property as a necessary incident. So new personal rights and obligations flow to her because of the fact that she is given a separate and distinct legal existence."

Clow v. Chapman, *supra*.

"The broad, comprehensive, unqualified power includes, by reasonable, if not necessary inference, all the rights in regard to the acquirement, enjoyment and disposal of property, which an unmarried woman possesses." Kriz v. Peege, *supra*.

The facts, and the reasoning of the opinion, in Mathewson v. Mathewson have been already given in § 99, note 51.

This subject may be appropriately closed by a quotation from McNaught v. Anderson, 78 Ga. 499, 6 Am. St. Rep. 278, in which Chief Justice Bleckley discussed the modern law concerning the rights of married women in his characteristically whimsical manner.

"The legal unity of husband and wife has, in Georgia, for most purposes been dissolved, and a legal duality established.

"A wife is a wife and not a husband as she was formerly. Legislative chemistry has analyzed the conjugal unit, and it is no longer treated as an element, but as a compound. A husband can make a gift to his own wife, although she lives in the house with him and attends to her household duties, as easily as he can make a present to his neighbor's wife. This puts her on equality with other ladies and looks like progress. Under the new order of things, when he induces her to enter into the business of keeping boarders and promises to let her have all the proceeds, he is allowed to keep his promise if she keeps the boarders. It would seem that the law ought to tolerate him in being faithful to his word in such a manner, although he has pledged it only to his wife, and we think it does."

16—See, *ante*, § 65.

17—Stephens v. Hicks, 156 N. C. 239, 36 L. R. A. (N. S.) 354, Ann. Cas. 1913 A 272.

states and also in the interpretation given to such statutes by the courts makes important the question by the law of what state the capacity of a married woman is to be tested. The question is too complicated to be presented at length here; but it may be said generally that the law of the place where the contract was made governs rather than that of the woman's domicile; but that if the contract is one affecting the title to real estate, the law of the state in which the land is situated will control.[18]

18—See the note L. R. A. 1916 A 1054, and the earlier notes there cited.

PART V

PARENT AND CHILD

CHAPTER XVII

THE RELATION OF PARENT AND MINOR CHILD. I.

§ 119. General considerations. The title of this chapter suggests the fact, often not mentioned in treating this subject, that the legal relation of parent and child continues only during the infancy of the child. When he or she reaches majority, the legal rights and duties herein treated of cease to exist; although the parent and adult child continue to be the nearest of kindred, standing next to husband or wife in all statutes of inheritance, and mutually obligated, each to contribute to the support of the other in case of necessity, by the statutes for the relief of pauperism and indigence.

The relation of parent and child may be created, either in a complete or in a partial form, in three ways: by legitimate birth, by illegitimate birth, and, under statutory provisions, by adoption.

§ 120. Legitimate and illegitimate birth. A legitimate child is "one between whose parents the relation of marriage subsisted either at the time when he was begotten, or at the time when he was born, or at some intervening period."[1]

That is to say, it is sufficient, first, if the parents were

1—Century Dictionary, *sub verbo* Legitimate, citing 2 Stephens Com. 283.

married when the child was begotten, though the father may have died, or the parents may have been divorced, before the child was born.

And, second, though the parents were not married at the time of the conception of the child, yet if they marry before the birth of the child it is regarded as legitimate; this is true by the civil and the canon law, as well as by the common law.

And the third branch of the definition explains itself; that if the parents, by marriage after the conception of the child, legitimate it, the subsequent death of the father or divorce of the parents would not take away the legitimation.

§ 121. Legitimation by marriage after birth of the child. As already stated, the civil, the canon and the common law agreed in the doctrine that marriage of the parents of a child after its conception, but before its birth, legitimated the child; but as to the farther extension of the doctrine to legitimation by marriage after the child's birth they differed. The civil or Roman law, and the canon or ecclesiastical law, held that the marriage of the parents of a child after its birth made it legitimate; but the common law refused to follow this rule.[2]

It remains the law of England, and the common law of the United States, to the present time, that marriage of the parents after the birth of a child does not legitimate the child,[3] but there has been a very general adoption of

2—It was upon this point that the Earls and Barons of England made their famous declaration in the reign of Henry III, when the Bishops proposed the adoption of the canon law on this subject. "Nolumus leges Angliae mutare, quae huc usque usitatae sunt et approbatae." 2 Kent's Com. 209. "And the which noble, courageous and heroic answer all the lawyers do mightily approve."

3—I Bl. Com. 446, 454, 455; **Brock v. State, 85 Ind. 397.**

But the courts of a state where the common law still prevails will recognize the legitimacy of a child whose birth was legitimated by

the civil law rule by statute in the different states. All the New England states except Rhode Island, and many of the middle, southern and western states have passed such statutes.[4]

The civil law excepted "adulterine bastards," or those born while one of the parents was the husband or wife of another person than the other parent, from the rule of legitimation by subsequent marriage, and the question has often been raised whether the same exception ought not to be made to the American statutes by implication; but the consensus of decisions is against the implied exception.[5]

Of course the mere fact of the marriage of the mother of a bastard child does not prove that the man whom she married is the father of her child; unless he acknowledges the paternity of the child, that is a fact requiring to be proved before the statute can be applied; and in the

a subsequent marriage by the laws of the state or country of the parents' domicil and marriage. Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669; Olmsted v. Olmsted, 190 N. Y. 458, 123 Am. St. Rep. 585.

And if by the law of a state where the father resided, and where he left an estate for distribution, a child is legitimated by subsequent marriage and recognition, such child will inherit as legitimate, although there is no such law where the birth and marriage took place. Munro v. Munro, 1 Rob. (Sc. Ap.) 492; Blythe v. Ayres, 96 Cal. 532, 19 L. R. A. 40; Hall v. Gabbert, 213 Ill. 208.

See the full note as to what law determines the legitimacy or illegitimacy of a child, Ann. Cas. 1917 C. 537.

4—See Stimson's Am. Statute Law; also the statutes of the several states.

If the marriage is itself invalid, it will not legitimate the prior born children. Olmsted v. Olmsted, 190 N. Y. 458, 123 Am. St. Rep. 585; Adams v. Adams, 154 Mass. 290, 13 L. R. A. 275.

5—**Ives v. McNicoll, 59 Ohio St. 402, 69 Am. St. Rep. 780, 43 L. R. A. 772;** Robinson v. Ruprecht, 191 Ill. 424; Miller v. Pennington, 218 Ill. 220, 1 L. R. A. (N. S.) 773; Scanlon v. Walshe, 81 Md. 118, 48 Am. St. Rep. 488.

See also Kealoha v. Castle, 210 U. S. 149, which reviews the cases and holds the decision of the Hawaiian courts in favor of legitimation to be controlling in the interpretation of an Hawaiian statute.

The only case to the contrary seems to be Sams v. Sams, 85 Ky. 396.

statutes of many of the states the public acknowledgement of the child by the father is a requisite to its legitimation.

§ 122. The presumption of legitimacy. Even where the mother of a child is a married woman at the time both of its conception and birth, the legitimacy of the child may conceivably be questioned by raising the doubt whether her husband was the real father of the child.

The natural presumption of legitimacy in such a case is very great, and the common law made it almost conclusive by admitting no proof of the illegitimacy of the child of a married woman except that the husband was wholly impotent and incapable of begetting a child, or that during the entire period of possible conception of the child, he was without the kingdom, *extra quatuor maria.*

Though the husband and wife had long separated, and the wife was living in open adultery with a paramour, the law refused to bastardize her children by proof of these facts.[6]

6—1 Bl. Com. 457; Coke on Littleson, 244a.

Even a stricter rule was held in 1304 (Year Book 32 and 33 Edward I, 60; Thayer's cases in Evidence, 2nd ed., 45) a child being held legitimate where the husband of its mother had been "over sea" for three years before its birth.

In Drennan v. Douglas, 102 Ill. 341, 40 Am. Rep. 595, a child born eight months after divorce of the mother was held to be within the presumption of legitimacy.

Where a child was born thirty-five days after the mother was divorced, and fifteen days after her marriage to another man, who acknowledged the child to be his, it was held to be the legitimate child of the second husband. Zachmann v. Zachmann, 201 Ill. 380, 94 Am. St. Rep. 180.

There is also a general presumption of legitimacy, by which a court will presume the marriage of the parents of a child in the absence of evidence as to that fact. **Re Matthews, 153 N. Y. 443;** Piers v. Piers, 2 H. L. Cas. 331; Orthwein v. Thomas, 127 Ill. 554, 11 Am. St. Rep. 159, 4 L. R. A. 434; Johnson v. Johnson, 30 Mo. 72, 77 Am. Dec. 598; Caujolle v. Ferrie, 23 N. Y. 90; Vaughan v. Rhodes, 2 McCord L. (S. C.) 227, 13 Am. Dec. 713. And it has been held that the presumption of legitimacy will operate strongly against the proof of a former marriage of the husband, which, if found true, would invalidate the

The modern law has relaxed this extreme position, and holds that the presumption that the husband of the wife is the father of the child may be rebutted by clear and satisfactory proof that there was no "access" of the husband to the wife, this term meaning not only that there was no sexual intercourse between them, but that they were so wholly separated that there was no possibility in such intercourse during the entire period when a child might have been begotten.

But if this non-access is not proven, the court will not hear evidence to determine whether the husband or an adulterer is the true father of the child. That is, the proof must show the impossibility, and not the mere improbability, of the husband being the father, or the presumption will prevail.[7]

marriage of which the children were born. Lieng v. Quia, 228 U. S. 135; Bowman v. Little, 101 Md. 273, 1084.

As slaves could not legally marry, all their children were illegitimate. As to the curious situation which resulted after emancipation, see Johnson v. Shepherd, 143 Ala. 325, 5 Ann. Cas. 143, and cases cited in the note 5 Ann. Cas. 144.

7—The Banbury Peerage case, 1 Sim. & Stuart (H. L. 1811), Thayer's Cases on Evidence, 2nd ed. 45; **Wright v. Hicks, 12 Ga. 155, 56 Am. Dec. 451;** Sergent v. No. Cumberland Mfg. Co., 112 Ky. 888; Grant v. Mitchell, 83 Me. 23; Scanlon v. Walshe, 81 Md. 118, 48 Am. St. Rep. 488; Canaan v. Avery, 72 N. H. 591; Cross v. Cross, 3 Paige Ch. (N. Y.) 139, 23 Am. Dec. 778; Woodward v. Blue, 107 N. C. 407, 22 Am. St. Rep. 897; Powell v. Fowler, 84 Ohio St. 165, 36 L. R. A. (N. S.) 255; Com. v. Shepherd, 6 Binney (Pa.) 283, 6 Am. Dec. 449.

The child is "born in wedlock," and the presumption that the mother's husband is its father exists, though the birth of the child is so soon after the marriage as to show that its conception must have been before the marriage. In fact, that he married the woman knowing of her pregnancy would be the strongest evidence of his recognition of his paternity. **Miller v. Anderson, 43 Ohio St. 473, 54 Am. Rep. 823;** Grant v. Stimpson, 79 Conn. 619; Wright v. Hicks, 12 Ga. 155, 56 Am. Dec. 451; Zachmann v. Zachmann, 201 Ill. 380, 94 Am. St. Rep. 180; State v. Shoemaker, 62 Iowa 343, 49 Am. Rep. 146; Dennison v. Paige, 29 Pa. St. 420, 72 Am. Dec. 644; Bowles v. Bingham, 2 Munf. (Va.) 442, 5 Am. Dec. 497.

If he proved that he was ig-

And the difficulty of overcoming that presumption is increased by another rule, stated as a rule of public policy and decency, and long unquestioned, to wit: that neither husband nor wife will be permitted to testify to the fact of non-access; the proof of the entire separation of husband and wife must come, therefore, from some other source than themselves.[8] Both the reasons and the early precedents on which this rule of evidence rests have lately been ably and sharply challenged, and its authority shaken thereby; but it is still undoubtedly the rule of American law, whatever it may become in the future.[9]

norant of her pregnancy, and had never had intercourse with her, the presumption would not exist; those facts are ground for avoidance of the marriage for fraud. See *ante*, § 40.

Admissions of paternity by the alleged paramour are not sufficient to overcome the presumption of legitimacy. Scanlon v. Walshe, 81 Md. 118, 48 Am. St. Rep. 488; Bethany Hospital Co. v. Hale, 64 Kans. 367; Foote v. State, 65 Tex. Cr. 368, Ann. Cas. 1916 A 1184 and note.

The presumption does not exist where a mulatto child is born to the white wife of a white man. Bullock v. Knox, 96 Ala. 159; Watkins v. Carleton, 10 Leigh. (Va.) 560.

In some cases, "access" seems to be understood as synonymous with sexual intercourse, e. g., in State v. Shaw, 89 Vt. 121, L. R. A. 1915 A 1087. It is expressly so defined in Dennison v. Paige, 29 Pa. St. 420, 72 Am. Dec. 644. This seems an unnatural interpretation of the term, and renders it wholly superfluous. The true meaning is "such access as affords an opportunity for sexual intercourse." Head v. Head, 1 Sim. & Stuart 150, 1 Turner & Russell 141.

8—**Dennison v. Paige, 29 Pa. St. 420, 72 Am. Dec. 644;** Kennedy v. State, 117 Ark. 113, Ann. Cas. 1917 A 1029 and note, L. R. A. 1916 B 1052 and note; Re Mills, 137 Cal. 298, 92 Am. St. Rep. 175; Scanlon v. Walshe, 81 Md. 118, 48 Am. St. Rep. 488; Egbert v. Greenwalt, 44 Mich. 246, 38 Am. Rep. 260; Robeke v. Baer, 115 Mich. 328, 69 Am. St. Rep. 567; Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255; Boykin v. Boykin, 70 N. C. 262, 16 Am. Rep. 776; Mink v. State, 60 Wisc. 583, 50 Am. Rep. 386; Schuman v. Schuman, 83 Wis. 255.

The evidence of the husband or wife is equally inadmissible whether it is offered to support or to deny the legitimacy of the child. Boykin v. Boykin, 70 N. C. 262, 16 Am. Dec. 776.

9—Professor Wigmore, in his great book on Evidence, vol. 3, §§ 2063-4, has made a most effective and convincing attack on this

Illegitimate birth includes all cases not within the above definition; that is, those where the parents were not lawfully married either at the time of conception or of birth of the child, or at any time between, and have not since been married under laws which give to such subsequent marriage the effect of legitimating the child. The case must also not be within the scope of any "Enoch Arden" or similar statute by which the children of a *bona fide* and *de facto* marriage are sometimes held to be legitimate, though the marriage itself is invalid.[10]

§ 123. Adoption. The process of adoption, by which the natural child of certain parents may become the legal child of other parents, was unknown to the common law.[11] It

rule both from the standpoint of its historical authority and from that of its inherent reasonableness. He points out that the rule as originally defined was one simply of caution against taking the testimony of husband or wife as conclusive as to the legitimacy or illegitimacy of the child; that the admissibility of the wife's evidence was not only assumed, but that it was clearly affirmed by Lord Hardwicke in 1734 in Rex v. Reading, Lee temp. Hardwicke 79; that this was the doctrine of the English courts down to 1777, when Lord Mansfield (Goodright v. Moss, Cowper 59) in a dictum resting on a plain misunderstanding of the earlier cases declared it to be a rule of decency, morality and policy, that neither husband nor wife should be permitted as a witness to bastardize the issue of the wife after marriage by testifying to the nonaccess of the husband; and that the great authority of Lord Mansfield led the American courts to accept his statement with very little examination as to its soundness. He also points out that the rule has many elements of absurdity; that no more violence is done to delicacy than in many other lines of investigation which the courts are constantly obliged to follow; and that in fact, in the great majority of instances, the testimony as to the total separation of husband and wife would have no element of indecency or indelicacy about it at all.

This emphatic expression of Professor Wigmore has already been approved by at least one American court of last resort. **Evans v. State, 165 Ind. 369, 2 L. R. A. (N. S.) 619, 6 Ann. Cas. 813.**

10—See, *ante*, § 38, note 22; and see also the note, L. R. A. 1915 C 764.

11—Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 789; Morrison v. Sessions, 70 Mich. 297, 14 Am. St. Rep. 500; Re Thorne, 155 N. Y. 140; Furgeson v. Jones, 17 Ore. 204, 11 Am. St. Rep. 808, 3

was well known, however, in the ancient civilizations, and has been borrowed by us from the Roman law. It therefore rests for its validity and operation entirely on the statutes of the several states.

But the statutes are in many respects similar, and there are certain general features of the statutory status of adoption.

Two things are usually essential: a contract between the natural parents, or other persons having the legal control of the child, and the adopting parents, by which the former give, and the latter receive, the child in adoption; and an approval of the contract by some court, usually the court which deals with probate matters.[12]

L. R. A. 620; Non-she-po v. Wawinta, 37 Ore. 213, 82 Am. St. Rep. 749; Re Carroll's Estate, 219 Pa. St. 440, 123 Am. St. Rep. 673; Re Walworth's Estate, 85 Vt. 322, Ann. Cas. 1914 C 1223, 37 L. R. A. (N. S.) 849; Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199.

No statute of adoption has ever been passed in England, and the legal status is unknown there. Re Quai Shing, 6 Brit. Col. 86.

The law of adoption in Greece and Rome is sketched in Woodward's Appeal, 81 Conn. 152; in Markover v. Krauss, 132 Ind. 294, 17 L. R. A. 806; and in Morrison v. Sessions, *supra*.

For its history in other ancient nations, see **Hockaday v. Lynn, 200 Mo. 456, 118 Am. St. Rep. 672, 8 L. R. A. (N. S.) 117, 9 Ann. Cas. 775.**

Adoption in accordance with the immemorial custom of an Indian tribe will not be recognized as legal. Non-she-po v. Wawinta, *supra*.

Sundry definitions of "Adoption" are collected in Cofer v. Scroggins, 98 Ala. 342, 39 Am. St. Rep. 54.

12—The provisions of the statutes in the respective states are given or summarized in Taber v. Douglass, 101 Me. 366; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Morrison v. Sessions, 70 Mich. 297, 14 Am. St. Rep. 500; Re Macrae, 189 N. Y. 142, 12 Ann. Cas. 505; Furgeson v. Jones, 17 Ore. 204, 11 Am. St. Rep. 808, 3 L. R. A. 620; and Woodward's Appeal, 81 Conn. 152, which recites the Wisconsin statute.

It has several times been held that an adult may be adopted, and thereby become the heir of the adopting parent, though the statute of adoption uses the word "child." Sheffield v. Franklin, 151 Ala. 492, 125 Am. St. Rep. 37, 12 L. R. A. (N. S.) 884; Markover v. Krauss, 132 Ind. 294, 17 L. R A. 806; Re Moran, 151 Mo. 555. The contrary has been held in A. H. G.'s petition, 1 W. N. C.

It is a usual requirement that the child shall himself consent to the adoption, if he is fourteen years of age or over; and that no person having a husband or wife, living and competent to act, shall adopt a child without the concurrence of such husband or wife.[13] In a few states adoption can be effected by the deed of the adopting parents, without the consent of the natural parents or the decree of any court.[14]

It is clear that the status of adoption, being an artificial creation and resting on the statute alone, can only be conferred by strict compliance with the requirements of the statute. If any substantial requirement of the statute is omitted, the proceedings are ineffectual, and the legal relationships of the child remain unchanged.[15]

(Pa.) 576; Moore's petition, 14 R. I. 38; Williams v. Knight, 18 R. I. 333.

13—For certain exceptional cases in which an adoption has been held valid without the concent of the wife, and the effect of such an adoption on her rights of succession, see Re Walworth's Estate, 85 Vt. 322, 37 L. R. A. (N. S.) 849, Ann. Cas. 1914 C 1223.

14—Helpire v. Claude, 109 Iowa 159, 77 Am. St. Rep. 524, 46 L. R. A. 171; Fosburg v. Rogers, 114 Mo. 122, 19 L. R. A. 201.

In Chehak v. Battles, 133 Iowa 107, 8 L. R. A. (N. S.) 1130, 12 Ann. Cas. 140, an adoption agreement, though not valid as such for want of acknowledgment by the adopting parents, was held to be enforceable against them as a contract to give such child the right of inheritance from them. Lynn v. Hockaday, 162 Mo. 111, 85 Am. St. Rep. 480, gives the same effect to a parol adoption agreement.

Under this form of adoption, the child inherits from parents who had adopted him by their deed, though without the consent of the natural parents. He is the legal child of both sets of parents. Clarkson v. Hatton, 143 Mo. 47, 60 Am. St. Rep. 635, 39 L. R. A. 748.

In Pennsylvania adoption by deed is lawful, though there is also a proceeding for adoption by decree of court. In either case the intent of the adopting parent is the decisive fact. In this case the natural parents had abandoned the child, and their whereabouts were unknown. Re Peterson, 212 Pa. St. 453.

15—"The power to adopt minor children is a creation of the statute unknown to the common law, the statutory mode prescribed is the measure of the power, and an adoption is invalid unless made in

But if the statute is fully complied with, it results that the relation of the child to the adopting parents becomes that of parent and child, substantially the same as that

pursuance of the essential requirements of the statute." Woodward's Appeal, 81 Conn. 152, 165.

But nevertheless many courts have held that the statutes providing for adoption were of a highly beneficial character, and that they should be interpreted in a broad and liberal manner. **Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199; Re** Mc Keag, 141 Cal. 403, 99 Am. St. Rep. 80; Wilson v. Otis, 71 N. H. 483, 93 Am. St. Rep. 565; Parsons v. Parsons, 101 Wisc. 76, 70 Am. St. Rep. 894.

Minor irregularities cannot be set up by heirs of the adopting parents, when those parents during their life adhered to it. Re Williams, 102 Cal. 70, 41 Am. St. Rep. 163.

The rule is stated more strictly in Taber v. Douglass, 101 Me. 363, and in Watts v. Dull, 184 Ill. 86, 75 Am. St. Rep. 141; but liberally in Flannigan v. Howard, 200 Ill. 396, 93 Am. St. Rep. 201, 59 L. R. A. 664.

Lack of consent by or notice to a living father is fatal to the adoption proceedings, although he had abandoned the child. Schlitz v. Roenitz, 86 Wisc. 31, 39 Am. St. Rep. 873, 21 L. R. A. 483; Furgeson v. Jones, 17 Ore. 204, 11 Am. St. Rep. 808, 3 L. R. A. 620; Beatty v. Davenport, 45 Wash. 555, 122 Am. St. Rep. 937. *Contra*, Nugent v. Powell, *supra;* Parsons v. Parsons, *supra.*

Statutes for adoption are all primarily based on the consent of the child's parent or parents if living and accessible; any exception which permits adoption without such consent must clearly come within the provisions of the statute. Tiffany v. Wright, 79 Nebr. 10.

But the statute may lawfully dispense with consent by or notice to a parent whose custody of the child has been taken from him in a divorce proceeding based on his adultery. Re Williams, 102 Cal. 70, 41 Am. St. Rep. 163. And if the father lives in Scotland, while the child is an actual resident of the state, adoption may be validly based on notice by publication. Stearns v. Allen, 183 Mass. 404, 97 Am. St. Rep. 441.

"While the general rule is that a child cannot be adopted without the consent of its parents, there are several exceptions to the rule; as for instance, if either parent has been deprived of civil rights, or adjudged guilty of cruelty or adultery and for that reason divorced, or adjudged an habitual drunkard, or has abandoned the child. In any of these cases the consent or presence of such parent is unnecessary. Otherwise it is necessary." Re McKeag, *supra.*

The facts that will support an adoption without the consent of the natural parents are discussed fully in the note, **Ann. Cas. 1914 A 221.**

between natural parents and their children.[16]

16—Jobson v. Jobson, 164 Cal. 312, 43 L. R. A. (N. S.) 1062; Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 789; Gray v. Holmes, 57 Kans. 217, 33 L. R. A. 207; Markover v. Krauss, 132 Ind. 294, 17 L. R. A. 806; Re Walworth's Estate, 85 Vt. 322, 37 L. R. A. (N. S.) 849, Ann. Cas. 1914 C 1223; Re Masterson, 45 Wash. 48, 122 Am. St. Rep. 886. If the adopting parents die, and the child becomes an orphan, he may be re-adopted without notice to the natural parents. Re Macrae, 189 N. Y. 142, 12 Ann. Cas. 505.

But where land is deeded to life tenants with remainder to their "bodily heirs," they cannot defeat the rights of reversioners by adopting a child. Clarkson v. Hatton, 143 Mo. 47, 69 Am. St. Rep. 635, 39 L. R. A. 748. On the different facts of the cases a bequest to one with remainder to her "heirs" was held to include an adopted child in Butterfield v. Sawyer, 181 Ill. 598, 79 Am. St. Rep. 246, 52 L. R. A. 75, and not to include an adopted child in Wallace v. Nolan, 246 Ill. 535, 13 Am. St. Rep. 247. The real question is as to the intent of the testator. See the note L. R. A. 1918 B 123. Children of an adopted child are "lawful issue" of the adopting parent under the exemption of legacies to lawful issue from the inheritance tax. Re Winchester, 140 Cal. 468.

"Lawful heirs" was held not to include an adopted child, under the special circumstances of the case, in Morrison v. Sessions, 70 Mich. 297, 14 Am. St. Rep. 500. The New York statute especially protects a remainder created by will from being defeated by the adopting of a child; but this provision will not be extended to a remainder by deed. Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 116 Am. Rep. 536.

Under the Massachusetts statute a father can sue for the death of his child by the tort of the defendant, though the child were his only by adoption. Bouthier v. Malden, 226 Mass. 479, Ann. Cas. 1918 C 910.

Adoption, like the birth of a child, will *ipso facto* revoke a prior will of the adopting parent. Helpire v. Claude, 119 Iowa 149, 77 Am. St. Rep. 524, 46 L. R. A. 171. But see the contrary decisions cited and distinguished in that case.

An adopted child was held entitled to the benefits of homestead exemption in Cofer v. Scroggins, 98 Ala. 342, 39 Am. St. Rep. 54. And to take as an after born child would, under a statute which makes a will subject to the inheritance of his statutory right by an after born child, unless an intent to exclude him expressly appears. Flannigan v. Howard, 200 Ill. 396, 93 Am. St. Rep. 201, 59 L. R. A. 664. To take under an insurance policy payable to surviving children; Virgin v. Marwick, 97 Mo. 578; or under a will in favor of "issue" of a granddaughter. Hartwell v. Tafft, 19 R. I. 644, 34 L. R. A. 500; not to be the "next-of-kin" entitled to

The statutes and decisions of the different states differ widely as to the rights of inheritance to and from an adopted child, and also as to the legal relation of the adopted child to the relatives of the adopting parents.

When the child becomes the legal son of the adopting father, does he thereby become the grandson of *his* father, the brother of his natural born children, and so on? It is one thing to empower the adopting parents to themselves take a new child by contract, and a somewhat different thing to empower them to confer upon others of the family a new relative, not of the family blood.

By some of the statutes the adopted child acquires a legal right of inheritance to its adopting parents only, and not to their relatives;[17] in others, the adopting child

sue for death of the parent; Heidecamp v. Jersey City R. Co., 69 N. J. L. 284, 101 Am. St. Rep. 707.

17—Russell v. Jordan, 58 Colo. 445, Ann. Cas. 1916 C 760; Hockaday v. Lynn, 200 Mo. 456, 118 Am. St. Rep. 672, 8 L. R. A. (N. S.) 117, 9 Ann. Cas. 775; Wallace v. Noland, 246 Ill. 535, 138 Am. St. Rep. 247; Helms v. Elliott, 89 Tenn. 446, 10 L. R. A. 535; Van Derlyn v. Mack, 137 Mich. 146, 109 Am. St. Rep. 669, 66 L. R. A. 537, 4 Ann. Cas. 879; Warren v. Prescott, 84 Me. 483, 30 Am. St. Rep. 370, 34 L. R. A. 500; Phillips v. McConica, 59 Ohio St. 1, 69 Am. St. Rep. 753; Durkee v. Batcheller, 39 R. I. 45, L. R. A. 1916 E 545.

The New York statute gives to the adopted child and his heirs or next-of-kin full rights of inheritance from the adopting parent. Re Cook, 187 N. Y. 253.

In Massachusetts the adopted child inherits from "the legal descendants but no other of the kindred of" the adopting parent, and retains his right to inherit from his natural parents and kindred. Delano v. Bruerton, 148 Mass. 619, 2 L. R. A. 698.

It was held in Humphries v. Davis, 100 Ind. 274, 50 Am. St. Rep. 789, that the adopted child may inherit from both its natural and its adopting parents; that property inherited by the child from one adopting parent will go to the other adopting parent, and not to the natural parents; the question who would inherit its property derived from other sources is left undecided.

In North Carolina, the child inherits from the foster parent, but the latter does not inherit from the child. Edwards v. Yearby, 168 N. C. 663, L. R. A. 1915 E 462.

In Maine he becomes "to all intents and purposes the child of his adopters, the same as if born to

has exactly the same rights as if he had been a natural-born child, both in relation to the adopting parents and to their relatives.[18]

Since adoption, like marriage or divorce, creates a status, from which the legal incidents of that status necessarily flow, the law of the domicil of the parties at the time of the adoption will control as to whether or not the status has been formed. Therefore, if a child is legally adopted in one state, and the parents and child then move into another, the child will have in the latter state the status of an adopted child though the adoption was not effected in accordance with the law of the latter state.[19]

But if the parents should die domiciled in the latter state, and by its law an adopted child inherits differently from a natural child, he will inherit only as an adopted child, though the law of the state where he was adopted gives an

them in lawful wedlock, except that he shall not inherit property expressly limited to the heirs of the body of the adopters, nor property from their lineal or collateral kindred by right of representation." R. S. 1903, p. 622, § 35.

18—**Schlitz v. Roenitz, 86 Wis. 31, 39 Am. St. Rep. 873, 21 L. R. A. 483;** Shick v. Howe, 137 Iowa 249, 14 L. R. A. (N. S.) 980; Carpenter v. Buffalo Gen. Elec. Co., 213 N. Y. 101, Ann. Cas. 1916 C 754 and note; Riley v. Day, 88 Kan. 503, 44 L. R. A. (N. S.) 296.

By the Connecticut statute the child has full rights of inheritance from its adopted parents "or their relatives, and shall not inherit estate from its natural parents and their relatives." G. S. 1918, § 4879. This gives the adopted children exactly the same status as a natural child of the adopting parents would have.

And the same is true of the Ohio statute with one specified exception. Ransom v. N. Y. C. & St. L. R. Co., 93 Ohio St. 223, L. R. A. 1916 E 704.

19—**Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321;** Re Williams, 102 Cal. 70, 41 Am. St. Rep. 163; Woodward's Appeal, 81 Conn. 152; Glos v. Sankey, 148 Ill. 536, 39 Am. St. Rep. 196, 23 L. R. A. 665; Gray v. Holmes, 57 Kan. 217, 33 L. R. A. 207; Caldwell's Succession, 114 La. 195, 108 Am. St. Rep. 341; Melvin v. Martin, 18 R. I. 650.

The same rule is laid down by statute in Maine. R. S. 1903, p. 622-3, § 35.

And see Brewer v. Browning, 115 Miss. 358, Ann. Cas. 1918 B 1013, L. R. A. 1918 F 1185.

adopted child full rights of inheritance.[20] And *vice versa*, if the law of the domicil of the deceased gives a wider right of inheritance to an adopted child than does that of the state of the adoption, the former will prevail.[21] That is, his status as an adopted child is determined by the law of the state of the adoption: but his right of inheritance as an adopted child, by the law of the domicil of the deceased.[22]

§ 124. The reciprocal duties of parent and child. The law of parent and child is unlike the law relating to most classes of property rights because, while the reciprocal rights and duties of parent and child are often discussed in legal text-books, they fortunately do not often come before the courts for definition and exact application; and there is therefore an occasional vagueness, and an absence of reported cases to which one may refer to support and accurately define the recognized rules.

In this respect they are like the mutual rights of husband and wife to each other's society, kindly treatment and conjugal affection—unquestionably existing, and of the highest importance, and yet resting rather on their

20—Keegan v. Geraghty, 101 Ill. 26.

And where a child's adoption was by a special act of the legislature of another state, which declared that she "shall inherit from the said S. as if she were his legitimate child," it does not follow that she is the heir of S. within the statute for the substitution of the heirs of a son of the intestate in the place of their father. Re Sunderland, 60 Iowa 732.

So in interpreting the term "lawful issue" in a will the court will not necessarily hold an adopted child to be included, though by the law of the place of adoption the child had full rights of inheritance. N. Y. Trust Co. v. Viele, 161 N. Y. 11, 76 Am. St. Rep. 238.

21—As to the inclusion of adopted children under the term "issue," see also Riley v. Day, 88 Kan. 503, 44 L. R. A. (N. S.) 296; and Morse v. Osborne, 75 N. H. 487, 30 L. R. A. (N. S.) 914 and note, Ann. Cas. 1912 A 324.

22—Van Maitre v. Sankey, 148 Ill. 536, 39 Am. St. Rep. 196, 23 L. R. A. 665.

universal recognition by social opinion and usage than on judicial decisions.

So reluctant have the courts been to encourage litigation over personal rights between members of the same family, that it seems well-established that a minor cannot sue the father for a tort to the person, though of an aggravated nature.[23] The decisions upon this point are all recent; and that very fact shows that the action has not been generally supposed to be maintainable. However great the hardship may seem to be in a case of great cruelty or outrage to a child, to make a father liable to a suit for damages for a personal tort might open the way to far greater evils than it would prevent or redress.

It would hardly be promotive of public policy to allow an insolent and defiant child to hold over the father the threat of a suit to test the justification and sufficiency of punishment; and even in extreme cases it may well be deemed better to leave the child's protection to criminal prosecution carried on by the officers of the law than to a suit by the child himself.

It will be remembered that a similar rule was universally applied to actions for a personal tort between husband and wife until very recently, when a few courts have reversed it and recognized such a right of action.[24]

The same reason does not apply to a suit for tort to the property of the child; as to property rights the child is practically independent of his father, and the same considerations of public policy hardly apply.

§ 125. The father's duty to protect and to educate the

23—**Roller v. Roller, 37 Wash. 242, 107 Am. St. Rep. 708, 68 L. R. A. 893, 3 Ann. Cas. 1;** Hewlett v. George, 68 Miss. 703, 13 L. R. A. 682; McKelvey v. McKelvey, 111 Tenn. 388, 102 Am. St. Rep. 787, 64 L. R. A. 991, 1 Ann. Cas. 130.

After emancipation, a child can sue his parents for a tort to the person. Taubert v. Taubert, 103 Minn. 247.

24—See ante, § 99.

child. The father has the right, and owes to his minor child the duty, of personally protecting him. Such force as one might exert in self-defense he may exert in defense of a child,[25] and injuries to a child are recognized as a provocation which may reduce even an unjustifiable homicide from murder to manslaughter.[26] This of course applies particularly to carnal abuse of a daughter.

But, as Blackstone says, this duty of protection is assured by a natural impulse, which the law needs to check rather than to spur.

The duty of affording to the child an education suited to his needs and capacities, which has always been recognized as a moral duty in so far as it was within the father's power, but with no definite standard fixed and enforced by positive law, has become definite and capable of exact enforcement by our modern school laws by which the state, itself assuming the cost of education of all its children, compels the parent to use these privileges, and to send his children to the public school or to some private school of adequate standard.

The length of time during which the father is compelled to send his children to school varies widely in the different states; even in the most advanced states the legal duty extends only to very elementary education.[27]

25—1 Black. Com. 850; Com. v. Malone, 114 Mass. 295.

The right extends to members of a family generally. Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370.

And see, *ante*, § 56, note 11.

And a son has the same right in defense of his father. Foster v. State, 102 Tenn. 33, 73 Am. St. Rep. 855.

26—1 Black. Com. 450; 2 Swift's Dig. (273); Campbell v. Commonwealth, 88 Ky. 402, 21 Am. St. Rep. 348; State v. Grugin, 147 Mo. 39, 71 Am. St. Rep. 563, 42 L. R. A. 774; McWhirt's case, 3 Gratt. (Va.) 394, 46 Am. Dec. 196.

27—In Cory v. Cook, 24 R. I. 421, it was sought to hold a father liable for the education of his children beyond that furnished by the public schools, as a part of their necessary support; but the court did not decide that question. Such a claim would hardly seem supportable in view of the nar-

§ 126. The father's duty to support the child. This duty, while imposed by the elementary dictates of natural law, is one the enforcement of which by a civil action is not always easy. The very similar duty of supporting the wife is readily enforced by conferring on her an implied agency to procure articles for her own support on the husband's credit, when he fails to furnish them. But in the case of a child, at least of a young child who is most likely to need support, his own incapacity makes it impossible for him to act as the father's implied agent.

This difficulty of working out the duty of support by the same method that is used in the law of husband and wife has led some courts to say that the duty of a father to support his child is one of moral obligation only, and not a legal duty. The surprising statement has been made by the courts of New Hampshire, Vermont, Illinois and New Jersey, among others.[28]

But it has not commended itself to the courts of most of the states, and the great preponderance of authority is to the effect that the father's duty to support his child is a legal as well as a moral duty; that if he casts off his child and leaves it without the necessaries of life, he sends with it, if not an implied agency to the child to procure neces-

row limits which the courts have usually given to the necessary support which is chargeable to the father.

See also Re Ryder, 11 Paige Ch. (N. Y.) 185, 42 Am. Dec. 109.

Compare *ante*, § 5, note 27.

28—**Kelly v. Davis, 49 N. H. 176, 6 Am. Rep. 499; Hunt v. Thompson**, 4 Ill. 179, 36 Am. Dec. 540; Freeman v. Robinson, 38 N. J. L. 383, 20 Am. Rep. 399.

"While it is true beyond any question that the common law enjoins upon parents the duty of protecting, educating and maintaining their children, it is also true that, in the absence of statute, the common law never afforded any means of enforcing its obligation. In the language of Lord Eldon in Wellesley v. Duke of Beaufort (2 Russ. 3-23), 'the courts of law can enforce the rights of the father, but they are not equal to the task of enforcing the duties of the father.'" Ramsey v. Ramsey, 121 Ind. 215, 6 L. R. A. 682.

saries, at least an implied agency to any third person to furnish such necessaries on the father's credit.[29]

Probably the two lines of cases do not differ so widely in their exact results as the general statements contained in the opinions would indicate.

Both lines of cases agree that the child has no general authority to procure articles, even necessaries, on his father's credit; both agree that a child's situation and needs *may* create an implied authority to a third person to supply him; where the cases come into direct conflict is that the stricter cases hold that the liability must spring from the father's contract or promise, express or implied, so that if he expressly refuse to sanction the expenditure no civil action can be had,[30] while the more liberal cases hold that

29—**Gilley v. Gilley, 79 Me. 292, 1 Am. St. Rep. 307;** Shields v. O'Reilly, 68 Conn. 256; **Leibold v.** Leibold, 158 Ind. 60; Porter v. Powell, 79 Iowa 151, 18 Am. St. Rep. 353, 7 L. R. A. 176; Alvey v. Hartwig, 106 Md. 254; Re Ryder, 11 Paige Ch. (N. Y.) 185, 42 Am. Dec. 109; Beardsley v. Hotchkiss, 96 N. Y. 202, 219; Pretzinger v. Pretzinger, 45 Ohio St. 452, 4 Am. St. Rep. 542; Cory v. Cook, 24 R. I. 421.

It follows that the father, and not the child's estate, is liable for funeral expenses of a minor child. Rowe v. Raper, 23 Ind. Ap. 27, 77 Am. St. Rep. 411. And see the note, Ann. Cas. 1913 E 929.

Even the wife, who has supported the children when they had been abandoned by the father, who was of ability to support them, can sue him, after she has obtained a divorce, for her expenses in caring for the children before the divorce. Rogers v. Rogers, 93 Kan. 114, L. R. A. 1915 A 1137.

As to the support of children after a divorce, see the next section.

30—See the cases cited in note 28, and also Gordon v. Potter, 17 Vt. 348.

"The right of a third person to recover, who has discharged the obligation of the father and supplied his offspring with necessaries which he neglected to furnish, must in every case be predicated upon a contract express or implied." Ramsey v. Ramsey, 121 Ind. 215, 6 L. R. A. 682. But this case defines the circumstances from which the contract may be implied so broadly as to leave a very narrow distinction between this doctrine and that held in the cases cited in the next note. "There may have been no intention to contract at all, and yet one may have come under a legal duty to another of such a character

the father's duty imposes upon him the liability even against his express refusal—creates an *imputed* agency where none can be implied, to use the phrase which has been used in discussing the same question in the law of husband and wife.[31]

But even in the more liberal states such an imputed liability of the father must be based on a positive neglect of duty, and the stranger who furnishes supplies to the child does so at his peril of being able to prove such neglect. It makes no difference that the articles are in themselves things needed for the child's support, unless the father had left the child destitute of them. It is for the father to fix the place of support, and the quality of his child's food and clothing, and a stranger could not set up his judgment against that of the father unless the latter had been guilty of a clear neglect of duty.[32]

The duty of support is correlative to the right to the child's custody and services, and if the child has without just cause left his father, or if the mother is wrongfully keeping him away from the father, the father is not liable to pay for his support.[33] But if the father has driven the child from home by cruel treatment, while he loses his right to the child's earnings, he is still liable for his necessary support and for his funeral expenses.[34]

that the law precludes him from asserting that he did not agree to perform it, and thus, by fiction of law, a contract results by construction or implication."

31—Owen v. White, 5 Port. (Ala.) 435, 30 Am. Dec. 572; Stanton v. Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255; Lamson v. Varnum, 171 Mass. 237; Finn v. Adams, 138 Mich. 258; McGoon v. Irvin, 1 Pinney (Wis.) 526, 44 Am. Dec. 409.

32—Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; Owen v. White, 5 Port. (Ala.) 433, 30 Am. Dec. 572; Conboy v. Howe, 59 Conn. 112; Hunt v. Thompson, 4 Ill. 179, 36 Am. Dec. 538.

33—Angel v. McClellan, 16 Mass. 28, 8 Am. Dec. 118; Baldwin v. Foster, 138 Mass. 449; Glynn v. Glynn, 94 Me. 465; Hyde v. Leisenring, 107 Mich. 490.

34—Honeycutt v. Thompson, 159 N. C. 29, 40 L. R. A. (N. S.) 488, Ann. Cas. 1913 E 928.

Besides the civil liability which has been discussed, there are in many or all of the states statutes making non-support of minor children—as well as that of a wife—criminally indictable; and it is upon such criminal proceedings that the legal enforcement of the duty of support chiefly relies.[35]

§ 127. Support of the children of divorced parents. A difficult question sometimes arises as to the respective duty of the parents to support their children after a divorce. As divorce courts commonly have the power to pass orders in regard to the custody and maintenance of the children, the question will often be settled by the terms of the divorce decree; but if it is not, a peculiar state of things results. The former husband and wife have no longer any legal relation to each other, but they continue to be the father and mother of the children.

The guilty party to the divorce certainly ought not to be freed from his liability to support the children by his own misconduct; nor ought the innocent children to lose their right of support by the disagreement of their parents, or by the misconduct of either or of both.

If the decree simply grants a divorce, making no order as to the custody and support of the children, the father's primary liability remains unchanged; and a third party, or the divorced wife if she is caring for them, can sue him for their necessary support which he neglects to furnish.[36]

Where, however, the father is willing to take and support the child, and the mother refuses to allow him to do so, and she retains the child in her own custody without any order of court giving her that right, it would not seem

35—Whether it is a defense to the criminal prosecution that the wife or a stranger furnished the support, so that the child was not in fact destitute, see Hunter v. State, 10 Okla. Cr. 119, L. R. A. 1915 A 564 and note, Ann. Cas. 1916 A 612.

36—Gilley v. Gilley, 79 Me. 292, 1 Am. St. Rep. 307; Zilley v. Dunwiddie, 98 Wis. 428, 67 Am. St. Rep. 820, 40 L. R. A. 579.

on general principles that she could compel him to pay her for the support which he was ready to furnish in his own house, while refusing him the custody of the child, which naturally goes with the liability for its support. The argument is even stronger where the divorce was granted for the wife's fault.[37]

But the policy of the courts to cast the burden of supporting the children of a marriage upon the father is so strong that many decisions, apparently a decided majority, hold the father primarily liable, though the divorce was granted for the wife's fault and the children remain in her custody.[38]

If the wife obtains a decree giving her the custody, and does not obtain any order requiring the father to support the child, it is held in some cases that she thereby accepts the burden with the benefit, and that she has relinquished her right to claim the child's support from the father. Her only remedy, according to these cases, is to apply to the court which granted the divorce to modify its decree and to determine how the child shall be supported.[39]

But this doctrine has been denied in well-considered cases which hold that the father can not be relieved of his liability

37—Ramsey v. Ramsey, 121 Ind. 215, 6 L. R. A. 82; State v. Phillips, 1 Pen. (Del.) 11; Glynn v. Glynn, 94 Me. 465; Foss v. Hartwell, 168 Mass. 66, 60 Am. St. Rep. 366, 37 L. R. A. 589.

See also Fulton v. Fulton, 52 Ohio St. 229, 49 Am. St. Rep. 720, 29 L. R. A. 678.

38—Rowell v. Rowell, 97 Kan. 16, Ann. Cas. 1918 C 936 and note; Beigler v. Chamberlain, 138 Minn. 377, L. R. A. 1918 B 215.

39—**Hall v. Green, 82 Me. 122, 47 Am. St. Rep. 311;** Husband v. Husband, 67 Ind. 583, 33 Am. Rep. 107; Brow v. Brightman, 136 Mass. 187; Johnson v. Onsted, 74 Mich. 437; Brown v. Smith, 19 R. I. 319, 30 L. R. A. 680.

In Alvey v. Hartwig, 106 Mo. 254, the plaintiff was held entitled to recover, but on the distinct ground that in the divorce action no personal service was obtained upon the husband, and therefore no decree for support could have been rendered against him. The court say: "If the defendant had been summoned in the divorce case, it would be clear that the plaintiff would be barred in the case at bar."

by the fact that his misconduct has made a divorce necessary, nor by the mere silence of the divorce decree.[40] This seems now to be the prevailing rule.

§ 128. The father's liability to third persons for his child's torts. As a minor child has a right of action in his own name for injuries done to him by third persons, so he is personally liable to them for injuries which he may have done to them. This liability and its qualifications have been discussed already.[41]

It is a natural corollary that the father is not liable for torts committed by his child.

There may be cases where the father encouraged the child's acts so as to become a guilty participant, as where

40—**Spencer v. Spencer, 97 Minn. 56, 114 Am. St. Rep. 695, 2 L. R. A. (N. S.) 851, 7 Ann. Cas. 901;** Riggs v. Riggs, 91 Kan. 593, Ann. Cas. 1915 D 809 and note; Pretzinger v. Pretzinger, 45 Ohio St. 452, 4 Am. St. Rep. 542; Evans v. Evans, 125 Tenn. 112, Ann. Cas. 1913 C 294 and note; Gibson v. Gibson, 18 Wash. 489, 40 L. R. A. 587; Zilley v. Dunwiddie, 48 Wis. 428, 67 Am. St. Rep. 820, 40 L. R. A. 579.

In Fulton v. Fulton, 52 Ohio St. 229, 49 Am. St. Rep. 720, 29 L. R. A. 678, the fact that the divorce was for the husband's misconduct was held to be the controlling fact in Pretzinger v. Pretzinger, *supra;* and where the divorce had been for the wife's misconduct, but the custody of young children was given to her, she could not sue the father for her expenditures on their support.

In Connecticut the rule has somewhat oscillated. In Stanton v. Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255, it was held that the husband was liable to the divorced wife for the support of their child, where a divorce had been granted and the custody awarded to her; in Finch v. Finch, 22 Conn. 411, Stanton v. Willson is practically overruled, and it is denied that a wife can maintain an action for the entire support furnished, though the court intimated that she might be entitled to recover a fair contribution. And in Welch's Appeal, 43 Conn. 342, under a statute passed after the decision of Finch v. Finch, which provides that the divorced parents of a minor child shall maintain it according to their respective abilities (G. S. 1918, § 5292), an action was sustained to compel the husband to make a reasonable contribution to the expenses of their support, the court finding what proportion it was reasonable for him to pay.

41—*Ante,* § 18.

the father, knowing that the child was in the habit of making a reckless and dangerous use of firearms, permitted him to have them without control, but in such a case the father's tort, and not the child's, is the basis of the action.[42]

So, if the child was employed by the father, and was guilty of negligence in the course of his employment, the father might be liable on general principles of agency, as he would be for the acts of a stranger employed by him.[43]

A question that has often been raised in recent years is whether a father who has bought an automobile for the pleasure of his family, and permits his minor children to drive it, is liable for the negligent driving of such a child. Apparently the present weight of authority is somewhat against the liability;[44] but the father has been held liable

42—Hoverson v. Noker, 60 Wis. 511, 50 Am. Rep. 381; Meers v. McDowell, 110 Ky. 9256, 96 Am. St. Rep. 475, 53 L. R. A. 789; Chaddock v. Plummer, 88 Mich. 225, 26 Am. St. Rep. 283, 14 L. R. A. 675; Johnson v. Glidden, 11 S. Dak. 237, 74 Am. St. Rep. 795; Harris v. Cameron, 81 Wis. 239, 29 Am. St. Rep. 891.

In Hagerty v. Powers, 66 Cal. 368, 56 Am. Rep. 101, it was even held that a father could not be held liable for negligence for permitting a boy of eleven years to have and use a loaded pistol, the child having carelessly shot another child.

It is not sufficient that he knew the child to be of a vicious disposition. Paul v. Hammond, 43 Mo. 119, 97 Am. Dec. 381. Nor that, learning that the son had instituted a prosecution which is claimed to be malicious and wrongful, he expressed his satisfaction. Moon v. Towers, 8 C. B. (N. S.) 611, 98 E. C. L. 611.

43—Teagarden v. McLoughlin, 86 Ind. 476, 44 Am. Rep. 332; Mirick v. Suchy, 74 Kans. 715; Hower v. Ulrich, 156 Pa. St. 410; Schafer v. Osterbrink, 67 Wis. 495, 58 Am. Rep. 875.

And in such a case the father is not liable if the son, although using his father's horse by his permission, was engaged purely in his own business. Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336.

It was held in Teagarden v. McLoughlin, 86 Ind. 476, 44 Am. Rep. 332, that the doctrine of "independent contractor" will not exempt the father from liability where he contracted certain work to his minor son, since the parental relation gave him that right and power of control over the son the lack of which is the basis of the ordinary doctrine of independent contractor.

44—**Hays v. Hogan, 273 Mo. 1, L. R. A. 1918 C 715, Ann. Cas. 1918 E 1127;** Zeeb v. Bohnmaier,

in some well considered cases.[45]

But for the wrongful acts of the child as such, no liability exists against the father.[46] If the father is induced by the bringing of a suit against the son to settle for the damage which he has done, it is not because of any liability cast upon him by the law; but because of his natural desire to protect his child from disgrace, loss and possible imprisonment.

§ 129. **The rights of the father.** These fall into four classes: first, his right to the custody and control of the child; second, to his labor and earnings; third, to his property; and fourth, to recover for injuries by third persons to his parental rights.

§ 130. **The father's right of custody and control.** The father has, at common law, the unquestioned right of custody and control over his minor children as against the mother, and still more clearly as against any third person. This right he may maintain by his own use of necessary force, or can assert by action of *habeas corpus* if the child is detained from him. But more and more,

103 Kan. 599, 2 A. L. R. 883; Doran v. Thomsen, 76 N. J. L. 754, 131 Am. St. Rep. 677, 19 L. R. A. (N. S.) 335; Van Blaricum v. Dodson, 220 N. Y. 111, L. R. A. 1917 F 363; Blair v. Broadwater, 121 Va. 301, L. R. A. 1918 A. 1011; Arkin v. Page, 287 Ill. 420, 5 A. L. R. 216 and full note.

45—Griffin v. Russell, 144 Ga. 275, L. R. A. 1916 F 216; Kayser v. Van Nest, 125 Minn. 277, 51 L. R. A. (N. S.) 970; King v. Smythe, 140 Tenn. 217, L. R. A. 1918 F 293; Birch v. Abercrombie, 74 Wash. 486, 50 L. R. A. (N. S.) 59.

46—Kumba v. Gilham, 103 Wis. 312; Moon v. Towers, 8 C. B. (N. S.) 611, 98 E. C. L. 611; Baker v. Haldeman, 24 Mo. 219, 69 Am. Dec. 430; Scott v. Watson, 46 Me. 362, 74 Am. Dec. 457; Chastain v. Johns, 120 Ga. 977, 66 L. R. A. 958; Smith v. Davenport, 45 Kan. 432, 23 Am. St. Rep. 737; Evers v. Krouse, 70 N. J. L. 653, 66 L. R. A. 592.

In Louisiana, "the father or after his decease the mother are responsible for the damage occasioned by their minor or unemancipated children residing with them, or placed by them under the care of other persons." Civil Code, § 2318.

in determining controversies over the possession of a child, the courts have subordinated the legal rights of the father to the equities existing in the case, and still more to the real interest of the child itself.

If the question is between husband and wife, the court will consider the cause of the estrangement between them, and the question which was at fault in the separation, as proper factors in determining the custody of the children; but will regard as the controlling consideration the material and moral welfare of the child, as it will be affected by giving its control to one or the other parent. And even if the child is in the custody of a third person, as a grandparent or other relative, or even a stranger to the blood to whom the parents have entrusted him for a time, the court will not use its powers to take away the child and restore it to the parents, if the change is likely to be injurious to the welfare of the child.[47]

The paternal right to his children's custody and services may be lost by a voluntary contract conveying the right to a third person, if such contract is clear and certain; but such contract cannot be used by the father as a means of avoiding responsibility for the support and education of the child.[48]

A contract between the parents and a third party, by which the parents transfer the custody of their child, is valid if it is clearly for the best interest of the child; and it may be enforced, not only to protect the custody of the child as granted by the contract, but to compel the payment

47—See Hernandez v. Thomas, 50 Fla. 522, 111 Am. St. Rep. 137, 2 L. R. A. (N. S.) 203, 7 Ann. Cas. 446; Chapsky v. Wood, 26 Kans. 650, 40 Am. Rep. 321; and the other English and American cases reviewed, *post*, § 146, and notes 14 and 15 thereto.

And see the full notes, Ann. Cas. 1914 A 740-762; 41 L. R. A. (N. S.) 564.

48—Wilkinson v. Lee, 138 Ga. 360, 42 L. R. A. (N. S.) 1013 and note.

of the stipulated consideration, which in this case was to furnish support to the mother.[49]

In many states the common law theory of the superiority of right in the father over the mother as to the custody of their children has been entirely done away with by statutes making the father and mother joint guardians of the child, with equal rights. This topic will be discussed under the subject of Guardianship.[50]

Besides this recognition of the rights of the mother or other person having actual custody of the child as a defense to the father's assertion of his legal rights, the law by various administrative processes directly and affirmatively attacks the father's right to the custody of the child. Thus in divorce proceedings the court commonly by its order determines to which parent the custody of minor children shall be committed; probate, surrogates' or orphans' courts commonly have the power to appoint a guardian over the person of a child if its father is unfit to retain the natural guardianship. And in extreme cases the state interferes on its own account, and takes neglected, cruelly treated, or immorally brought up children into the hands of its public officers or charitable institutions.[51]

The fathers' control over the child extends to the infliction of reasonable punishment in the father's judgment; and there seems to be no real legal restraint upon this power, except the right of criminal prosecution when the punishment is so extreme as to constitute positive cruelty.[52]

49—Clark v. Clark, 122 Md. 114, 49 L. R. A. (N. S.) 1163.

50—See *post*, § 146, and note 10 thereto.

51—Van Walters v. Children's Guardians, 132 Ind. 567, 18 L. R. A. 431; Farnham v. Pierce, 141 Mass. 203, 55 Am. Rep. 452; State ex rel. Stearns County v. Klasen, 123 Minn. 382, 49 L. R. A. (N. S.) 597.

52—**McKelvey v. McKelvey, 111 Tenn. 388, 102 Am. St. Rep. 787, 64 L. R. A. 991, 1 Ann. Cas. 130;** State v. Jones, 95 N. C. 588, 59 Am. Rep. 282; Rowe v. Rugg, 117 Iowa 606, 94 Am. St. Rep. 318; Hornbeck v. State, 16 Ind. App. 484.

As has been already stated, the child itself cannot question the reasonableness of punishment inflicted upon it by a civil suit for damages.[53] Of course the habit of unreasonable punishment would be an element to prove the father's unfitness to retain the custody of the child in any proceeding brought to determine that question.

It has been held thaat the father's right to the custody of his child includes the possession, for the purpose of burial, of its dead body; and that he can maintain an action for the mutilation of the body by negligence, or by the performing without permission of an autopsy.[54]

§ 131. The father's right to the child's labor and earnings. A necessary complement to the father's duty to protect, support and educate his minor child, is his right to use the child's labor, either directly to assist him in his own family or business, or by putting him to work for others and collecting his wages.[55] So the father of a minor child who is earning wages has a right at any time to demand payment of the wages to himself.[56] But this right, being reciprocal to the father's duty of support, cannot be asserted if the father is failing to support the child.[57]

53—*Ante*, this chapter, note 23.

54—Burney v. Children's Hospital, 169 Mass. 57, 61 Am. St. Rep. 273, 38 L. R. A. 413; Floyd v. Atlantic Coast Line R. Co., 167 N. C. 55, L. R. A. 1915 B 519.

55—Godfrey v. Hays, 6 Ala. 501, 11 Am. Dec. 58; McGarr v. National Mills, 24 R. I. 447, 96 Am. St. Rep. 749; Tennessee Mfg. Co. v. James, 91 Tenn. 154, 30 Am. St. Rep. 865, 15 L. R. A. 211; Halliday v. Miller, 29 W. Va. 424, 6 Am. St. Rep. 653.

56—Cloud v. Hamilton, 11 Humph. (Tenn.) 104, 53 Am. Dec. 778.

If one employ a minor with notice of the non-emancipation of the infant, it will be no defense to the father's suit for the wages that the child has received them. On the other hand, payment to the father will be no defense to the minor's suit, if the employer knew of the fact of emancipation. Tennessee Mfg. Co. v. James, 91 Tenn. 154, 30 Am. St. Rep. 865, 15 L. R. A. 211.

57—Swift v. Johnson, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; Smith v. Gilbert, 80 Ark. 525, 8 L. R. A. (N. S.) 1098; Hollingsworth v. Swedenborg, 49 Ind. 378, 19 Am. Rep. 687; Nightingale v. Withington, 15 Mass. 272, 8 Am.

This right of the father is greatly limited by modern humanitarian laws; by the school laws of all our states the father is compelled during a considerable part of his child's minority to send him to school; and besides this the father's right to avail himself of the labor of his children in industrial pursuits has been greatly limited by statutes prohibiting the employment of child labor.

The father's right is also often terminated by emancipation.

§ 132. Emancipation of the child by contract. This may occur either by the father's agreement, or by the child's marriage.

Emancipation is the releasing by the father to the child of his right to its labor and earnings. The popular expression, "giving the child his time," is not an inappropriate description of the father's act.

Such agreement may be expressed, as when the father in so many words tells the son that he may henceforth be his own master, obtain work on his own account and keep his own wages; or it may be implied from such conduct of the father, and such attendant circumstances, as create a reasonable inference that he intended such emanicpation.[58]

Dec. 101; Wodell v. Coggeshall, 2 Metc. (Mass.) 89, 35 Am. Dec. 391; McCarthy v. Boston & Lowell R. Co., 148 Mass. 550, 2 L. R. A. 608; Clay v. Shirley, 65 N. H. 644.

58—**Whiting v. Earle, 3 Pick. (Mass.) 201, 15 Am. Dec. 207;** Cloud v. Hamilton, 11 Humph (Tenn.) 104, 53 Am. Dec. 778; Carthage v. Canton, 97 Me. 473; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Bristor v. Chicago Railroad Co., 128 Iowa 479; Webb v. Harris, 32 Okla. 491, Ann. Cas. 1914 A 602.

A father also effects an emancipation of his son by driving him away and refusing to support him, and in such a case he will not be allowed to testify that he did not intend to emancipate him. McCarthy v. Boston & Lowell R. Co., 148 Mass. 550, 2 L. R. A. 608.

See a comprehensive note on emancipation, 113 Am. St. Rep. 113.

"Emancipation will not enlarge the minor's capacity to contract. It simply precludes the father from asserting his claim to the

The Supreme Court of Massachusetts has said that "where a minor son makes a contract for his services on his own account, and the father knows of it and makes no objection, there is an implied assent that the son shall have his own earnings,"[59] and this may well be true as to the earnings made under that particular contract; but to effect a permanent and complete emancipation, an intention should be either expressed or reasonably implied from the acts of the parties that the father permanently surrenders his rights to the son's labor and earnings.[60]

It has sometimes been said that a complete emancipation "works an absolute destruction of the filial relation," so that the father ceases to be liable for the child's support. But this dictum seems unsound. The mutual duties of minor children and their parents are imposed by the law not merely as a matter of mutual obligation, but from considerations of public policy and general welfare; and they cannot be divested by any private agreement between them.[61]

wages of his child." Tennessee Mfg. Co. v. James, 91 Tenn. 158, 30 Am. St. Rep. 865, 15 L. R. A. 211.

"The meaning of emancipation is not that all the disabilities of infancy are removed, but that the infant is freed from parental control, and has a right to his own earnings." Commonwealth v. Graham, 157 Mass. 73, 34 Am. St. Rep. 255, 16 L. R. A. 578.

Emancipation is a gift and takes effect upon its acceptance. It is therefore revocable until it has been acted upon, but when once acted upon becomes irrevocable. Abbott v. Converse, 4 Allen (Mass.) 530; Morse v. Welton, 6 Conn. 547, 16 Am. Dec. 73.

59—Whiting v. Earle, 3 Pick. (Mass.) 201, 15 Am. Dec. 291; Corey v. Corey, 19 Pick. (Mass.) 29, 31 Am. Dec. 117.

See also Morse v. Welton, 6 Conn. 547, 16 Am. Dec. 243; Merrill v. Hussey, 101 Me. 439; Vance v. Calhoun, 77 Ark. 35, 113 Am. St. Rep. 111.

60—Smith v. Gilbert, 80 Ark. 525, 8 L. R. A. (N. S.) 1098.

"A mere waiver by the parent of the right to the earnings of his minor child does not alone constitute emancipation. There must be a surrender by the parent of the right to the services of his minor child, and also the right to the custody and control of his person." Taubert v. Taubert, 103 Minn. 247.

61—Torrington v. Norwich, 21 Conn. 543.

If a father by releasing to a son his wages has given him resources adequate to his support, that would eliminate the right of the son to procure necessaries on his father's credit just as the giving to him of a sufficient allowance would do; but it does not terminate the parental relation or the parental duty, and if the son later should become unable to work and in need of medical services or other necessaries, and the father refused to supply them, a third party could supply them on his credit.[62]

So it has been held that a father, by consenting to his minor daughter living away from home and supporting herself by her own earnings, does not relieve himself from liability for medical services afterward required by her.[63]

The distinction between a complete and partial emancipation has been carefully drawn in a recent Tennessee case, which holds that the father may recover damages for personal injuries to his son, though the son was working for himself and collecting his own wages.[64]

It seems evident that there has been loose thinking in some of the decisions as to emancipation. The courts have said that a child was completely emancipated when the question was merely as to his right to collect his own wages; but when the more serious and permanent effects of a dissolution of the parental tie came in question, they have found it necessary to modify these careless dicta.

The father's creditors have no right to object to his emancipation of his son, even if their ability to collect their debts may thereby be impaired; his right to the child's earnings is recognied, not as a general property asset in which his creditors can assert a right, but rather as a

62—**Lufkin v. Harvey, 131 Minn. 238, L. R. A. 1916 B 1111, Ann. Cas. 1917 D 583.**

63—Porter v. Powell, 79 Iowa 151, 18 Am. St. Rep. 353, 7 L. R. A. 176; Wallace v. Cox, 136 Tenn. 69, L. R. A. 1917 B 690.

64—Memphis Steel Cons. Co. v. Lister, 138 Tenn. 307, L. R. A. 1918 B 406 and note.

means of effecting the support of the minor himself in connection with the rest of the family.[65]

After emancipation, even the father himself may make a valid contract to hire his son and pay him wages.[66]

§ 133. Emancipation by marriage. The duties incurred by a minor, whether son or daughter, by marriage, are so inconsistent with the previous rights of the father that they effect an emancipation from the parental authority. The married son's earnings become changed with a duty to his wife and family superior to the rights of the father; the married daughter becomes subject to marital rights inconsistent with the right of her father to her control and custody.

As husband and wife they become the heads of a new family and necessarily cease to be the subordinate members of the former family.

Marriage then, either of son or daughter, effects a virtual emancipation.[67]

65—**Merrill v. Hussey, 101 Me. 439;** Lyon v. Bolling, 14 Ala. 753, 48 Am. Dec. 122; Bobo v. Bryson, 21 Ark. 387, 76 Am. Dec. 406; Atwood v. Holcomb, 39 Conn. 270, 12 Am. Rep. 386; Wilson v. McMillan, 62 Ga. 16, 35 Am. Rep. 115; Beaver v. Bare, 104 Pa. St. 58, 49 Am. Rep. 567; Penn v. Whitehead, 17 Grat. (Va.) 503, 522, 94 Am. Dec. 478; Halliday v. Miller, 39 W. Va. 424, 6 Am. St. Rep. 653.

66—Wilson v. McMillan, 62 Ga. 16, 35 Am. Rep. 115; Beaver v. Bare, 104 Pa. St. 58, 49 Am. Rep. 567.

67—**Com. v. Graham, 157 Mass. 73, 34 Am. St. Rep. 255, 16 L. R. A. 578;** State v. Lowell, 78 Minn. 166, 79 Am. St. Rep. 358, 46 L. R. A. 440; Holland v. Beard, 59 Miss. 161, 42 Am. Rep. 360; Bickerstaff v. Marlin, 60 Miss. 509, 45 Am. Rep. 418; Cochran v. Cochran, 196 N. Y. 86, 24 L. R. A. (N. S.) 160, 17 Ann. Cas. 782.

In Commonwealth v. Graham, *supra*, the court leave it undetermined whether the father might claim any part of the son's wages in excess of that required to support his family. So in Cochran v. Cochran, *supra*, the court add to their statement of the son's emancipation by marriage the qualifying clause: "so far at least as is necessary for the support of his family."

But it is evident that to thus divide the title to the son's earnings would be a difficult task for

§ 134. The father's rights in the child's property. The rights of control of a parent are limited to the *person* of the child; not unless he is properly appointed guardian of his child has he any control of or right in the child's property. He cannot therefore collect and release debts due to his child, lease, use or encumber by any contract his land, or bring any action in his behalf except as his next friend or guardian *ad litem*.

It is the policy and requirement of the law that a minor having property shall be protected as to that property by the appointment of a guardian; and while the father is, by the fact of his relation, natural guardian of the child's person, he is not guardian of the child's estate.[68]

the court, and one seldom of any practical value; and no case has been found where the attempt was made.

It was held in White v. Henry, 24 Me. 531, that while the marriage of a son with his father's consent may be another "exception" to parental rights, a marriage without such consent, which is required by the statutes of the state, does not defeat the father's right to claim his son's earnings. "We cannot believe that the violation of an express provision of law can secure to the minor who is guilty thereof a privilege that he would not otherwise possess."

That marriage without the parental consent does not affect emancipation has also been held in a series of Louisiana cases. Guillebert v. Grenier, 107 La. 614.

But that the consent of the father is not necessary to a marriage in order that it may affect an emancipation is held in State v. Lowell, 78 Minn. 166, 79 Am. St. Rep. 358, 46 L. R. A. 440; Holland v. Beard, 59 Miss. 161, 42 Am. Rep. 360, and Aldrich v. Bennett, 63 N. H. 415, 56 Am. Rep. 529.

In People v. Todd, 61 Mich. 234, the court held without discussion that proof of a son's marriage was "no legal testimony tending to show that he was emancipated;" and this case was "reluctantly" followed as controlling upon this question in Austin v. Austin, 167 Mich. 164, Ann. Cas. 1913 A 545.

68—See *post*, § 146, and notes 16 to 23.

As to the legal ownership of clothing and similar articles with which the father supplies the minor as a part of his support, see Shoemaker v. Jackson, 128 Iowa 488, 1 L. R. A. (N. S.) 137; Dickinson v. Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760.

In a Connecticut case decided in 1863 (Seldon's Appeal, 31 Conn. 553), it was held that by the stat-

ute of that state the father was, by virtue of that relation, guardian of his child's property as well as of his person; but in 1865 that interpretation was overthrown by a statute in conformity with the general rule. (Gen. Stat. 1918, § 4866.)

CHAPTER XVIII

PARENT AND MINOR CHILD—II.

§ 135. The father's right of action for the abduction of a child. Since the father's right to the custody of his child is of both practical and sentimental value, it necessarily follows that a direct violation of that right by abducting the child is an actionable tort. While the action of *habeas corpus* to compel the actual restoration of the child is perhaps a more frequent remedy, it has long been settled that a civil action for damages will also lie.[1]

While the loss of the child's services is the foundation of the action, it is not essential that the child should have rendered such services or even be capable of rendering them. The legal right to such services is all that is necessary to support the action; and when that right is shown to have been violated, the father may claim damages for the injury of his feelings and the loss of his child's companionship.[2]

§ 136. For tortious injuries to the child. If a minor child receives an injury by the actionable wrong of a third person, the right of action for the direct results of the injury is in the child itself.

The right of personal security belongs to the child, and he has the same right of action for its violation that an adult would have for the same act.

1—3 Black. Com. 140. Howell v. Howell, 162 N. C. 283, 45 L. R. A. (N. S.) 867 and note, Ann. Cas. 1914 A 393 and note; Rice v. Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777.

2—See the note Ann. Cas. 1914 A 897; and compare, *post*, § 138, where the same rule of damages is more fully discussed in its application to the seduction of a daughter.

So for the pain and suffering which results from the injury, the crippling or disfigurement of his body, the permanent disabilities, if any, the right of action is in the child himself, to be recovered by him in a suit brought by next friend.

But the father also has, if one may use the phrase, property rights in the personal safety of his child. Firstly, the father, as already stated, is entitled to the labor and earnings of the child, and therefore if the child's earning capacity is destroyed or diminished, there is an injury to the father's right separate from that done to the child itself. Secondly, the father, being bound to support the child, does ordinarily, and must unless the child has means of his own, bear the expense of the medical or surgical treatment, nurses, medicines, etc. And to obtain reimbursement for such expenses he has a right of action.

So that to obtain full redress for a serious injury done to a child, there must usually be two actions; one by the child for his personal injuries, and one by the father to recover for his loss of the child's services, and for the cost of his care.[3]

3—**Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671;** Bube v. Birmingham R. Co., 140 Ala. 276, 103 Am. St. Rep. 33; Durkee v. Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Larson v. Berquist, 34 Kan. 334, 55 Am. Rep. 249; Black v. Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586; Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249; Cumming v. Brooklyn City R. Co., 109 N. Y. 95; Woerckner v. Erie Elec. Co., 182 Pa. St. 182; Galligan v. Woonsocket R. Co., 27 R. I. 363.

In Tidd v. Skinner, 225 N. Y. 422, 3 A. L. R. 1145, it was held that the father or widowed mother could recover compensatory damages against a druggist who had sold their minor son habit-forming drugs in violation of the statute, and knowing the injury which was being done to the child.

That defendant employed a minor child at a dangerous employment without the father's consent is in itself a violation of his rights, which renders the defendant liable for any resulting injury, though no other negligence is shown. Haynie v. N. C. Elec. Power Co., 157 N. C. 503, 37 L. R. A. (N. S.) 580, Ann. Cas. 1913 C 232 and note; Gulf R. Co. v. Re-

These two rights of action are wholly independent of each other; and although the father may have instituted the first suit as next friend for his child, and may have recovered a substantial satisfaction in that suit, the recovery is no bar to his maintaining his own suit for loss of service and expenses.[4]

deker, 67 Tex. 190, 60 Am. Rep. 20; Tex. & Pac. R. Co. v. Brick, 83 Tex. 526, 29 Am. St. Rep. 675; Louisville R. Co. v. Willis, 82 Ky. 57, 4 Am. St. Rep. 124.

It was held in Cumming v. Brooklyn City R. Co., *supra*, that a father may recover for estimated future loss of services during the child's minority, but not for probable future medical expenses.

That he is entitled to recover for future loss of service to the age of twenty-one, if it is reasonably certain. Hussey v. Ryan, 64 Md. 426, 54 Am. Rep. 772.

In Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483, the general doctrine of the double right of action was applied to a case for malicious prosecution. A grandfather who stand *in loco parentis* may sue for loss of service and expenses incurred by the abduction of a child. Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593.

4—Horgan v. Pac. Mills, 158 Mass. 402, 35 Am. St. Rep. 504.

Sed contra, where in the former suit he had expressly claimed for loss of time and earnings, and that the child had been emancipated. Kenure v. Brainard & Armstrong Co., 88 Conn. 265.

Nor can the father offer the former judgment to prove defendant's liability. Bridge v. Asheville R. Co., 27 S. C. 456, 13 Am. St. Rep. 653.

The father's common law action is also independent of the statutory action given to the next-of-kin for a tort causing death. And although a son dies finally of his injuries, the father can maintain the common law action for loss of his services during minority and for expenses incurred in seeking to cure him. Davis v. Railway, 53 Ark. 117, 7 L. R. A. 283; Callagan v. Lake Hopatcong Ice Co., 69 N. J. L. 100; Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508; Jackson v. Pittsburgh Railway Co., 140 Ind. 241, 49 Am. St. Rep. 192; Covington St. R. Co. v. Parker, 9 Bush. (Ky.) 455, 15 Am. Rep. 725; Trow v. Thomas, 70 Vt. 580. But he cannot recover for the loss of services from the child's death till his majority, except in the manner provided by statute. See the next section. Stevenson v. Ritter Lumber Co., 108 Va. 575, 18 L. R. A. (N. S.) 316.

Contributory negligence by the father is a bar to the maintenance of his own action, but not to the action of the child. Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751.

Since the theory under which the father has a right to recover is that he has lost the service of his child, the older English cases required it to be strictly alleged and proved that the child was capable of rendering, and did render, some service to the parent.

"*Quare servitium amisit*" ("by which the plaintiff lost his service") was the formula used to describe the cause of action; and an actual loss of service must be proved. Therefore, if the child was too young to render any service, or if in fact it was not living with its parents but in another family, and its earnings were not received by the father, no action would lie.

But the modern tendency has been to make the allegation of actual loss of service a mere technicality of pleading; and to hold that if the father had not lost his right to the child's service, that is, if he had not permanently emancipated him or transferred his right to his service to another person, he can recover for the injury to his right, even though it does not appear that the child was in fact rendering service of any value; and if the child were too young during the whole period of his disability to render any services whatever, nevertheless the father can recover for his expenses in caring for him.[5]

§ 137. **For injuries resulting in death.** This secondary right of the father to recover for his loss of the child's services, and for the expense resulting from his injury, in cases where the child eventually recovers and therefore has himself the primary right of action for the injury, must be carefully distinguished from the right of action of the parents, as next-of-kin, for a wrongful act causing the death of the child.

5—Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 384; Cumming v. Brooklyn City R. Co., 109 N. Y. 95; Trow v. Thomas, 70 Vt. 580.

At common law no action lay for causing the death of a person. This somewhat surprising doctrine resulted in part from the feeling that the tort was merged in the crime, and that to permit a civil action to be maintained by an individual for an act which in the eye of the criminal law was murder or manslaughter, was opposed to some rule of public policy, and partly to a technical rule that the personal cause of action died with the person (*"actio personalis moritur cum persona"*).

But by Lord Campbell's Act, passed in England in 1846, which was almost immediately followed by similar statutes in all the American states, the wrongdoer by whose act death has been caused may be sued, either by the personal representatives of the deceased for the benefit of the next of kin, or by the next of kin directly in their own name.[6]

There are two theories as to the legal nature and effect of such statutes; the difference depending in part on the language of the statutes themselves, and in part on the different views of the courts whose duty it has been to construe them. One theory is that the statutes give a remedy by abolishing the rule that personal injuries die with the person; it results that the right of action which the injured person had immediately before his death survives to his next of kin as a part of his estate. The other theory is that the statute gives a new personal right to the next of kin to recover for the injuries which they have suffered by the loss of their relative.[7]

6—**Grosso v. Delaware R. Co., 50 N. J. L. 317;** Mobile Life Ins. Co. v. Brame, 95 U. S. 754; Conn. Mut. Life Ins. Co. v. N. Y. N. H. & H. R. Co., 25 Conn. 265, 65 Am. Dec. 571; Conners v. Burlington R. Co., 71 Iowa 490, 60 Am. Rep. 814; Major v. Burlington R. Co., 115 Iowa 309; Eden v. Louisville R. Co., 14 B. Mon. (Ky.) 165; Bligh v. Biddeford R. Co., 94 Me. 499; Carey v. Berkshire R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616; Gulf R. Co. v. Beall, 91 Tex. 310, 66 Am. St. Rep. 892, 41 L. R. A. 807. In Georgia the doctrine that one cannot recover for tortious acts causing death is held to apply only to felonious acts. Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698.

7—Perham v. Portland Elec.

This difference of view as to the nature of the statutory remedy is very important as affecting the measure of damages. If the cause of action is conceived of as having originally vested in the injured person himself, and as now vesting in his next of kin by inheritance, it follows that the pain and suffering caused to the deceased is an important, and often the most important, element of the damages to be allowed. In that view of the remedy, it has been questioned whether any damages at all could be recovered if the death were absolutely instantaneous, so that the deceased person could have had no pain or suffering. But it has been held that in such a case the court and the jury must make the

Co., 33 Oreg. 451, 72 Am. St. Rep. 730, 40 L. R. A. 799; Perry v. Philadelphia R. Co., 1 Boyce (Del.) 399.

In several states both remedies may be prosecuted, and are cumulative; a suit by the estate for the right of action which vested in the deceased, and one in behalf of the next-of-kin for the pecuniary loss suffered by them. Stewart v. United Electric Co., 104 Md. 332, 118 Am. St. Rep. 410, 8 L. R. A. (N. S.) 384; Eichorn v. New Orleans R. Co., 112 La. 236, 104 Am. St. Rep. 437.

And in Davis v. Railway, 53 Ark. 117, 7 L. R. A. 283, it was held that three rights of action exist and may be prosecuted, and three judgments and satisfactions obtained: one by the personal representatives for the benefit of the estate for the damages suffered by the deceased; one by the personal representatives for the benefit of the next-of-kin; one by the father for loss of services until the child's death.

See also Brown v. Chicago R. Co., 102 Wis. 137, 78 N. W. 771, 44 L. R. A. 579.

But it is held that but one recovery can be had, and that the bringing of one suit is a bar to others, in Sweetland v. Chicago R. Co., 117 Mich. 329, 43 L. R. A. 568; Legg v. Britton, 64 Vt. 656; Louisville R. Co. v. McElwain, 98 Ky. 700, 56 Am. St. Rep. 385, 34 L. R. A. 788; Munro v. Pac. Coast Dredging Co., 84 Cal. 515, 18 Am. St. Rep. 248.

It seems to be agreed in all the cases that during the life of the injured person the cause of action is single and if he releases it, or receives satisfaction of a judgment, no action can be brought after his death to recover for the same injury. So. Bell Tel. Co. v. Cassin, 111 Ga. 575, 50 L. R. A. 694; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Hill v. Pa. R. Co., 178 Pa. 223, 56 Am. St. Rep. 754, 35 L. R. A. 196; Price v. Railway Co., 33 S. C. 556, 26 Am. St. Rep. 700; and many other cases cited in Perry v. Philadelphia R. Co., 1 Boyce (Del.) 399.

difficult estimate of the value to the deceased person of his own life; that is to say, they must estimate the pecuniary value of his life to him in view of his condition of health, expectation of life and prospects of future earnings. Such an estimate, while of course it leaves a very wide scope for the exercise of the judgment and opinion of the jury, may not be any more difficult than other estimates which juries are often required to make.[8]

On the second theory, the damage to be recovered is that suffered by the next of kin. The pain suffered by the deceased is not material, for that has perished with him, and is not a cause of action in the living plaintiff; and it is commonly held that the grief which the next of kin have suffered by the untimely death of their relative is not capable of being estimated or made good by pecuniary damages, and consequently can not be taken into the account.[9]

8—**Broughel v. So. N. E. Tel. Co., 73 Conn. 614, 84 Am. St. Rep. 176;** Olivier v. Houghton St. R. Co., 134 Mich. 367, 104 Am. St. Rep. 607.

In certain cases it has been held, as in Mulchey v. Washburn Car Wheel Co., 145 Mass. 281, 1 Am. St. Rep. 458, that on this theory of the statute no recovery at all could be had if death was instantaneous without conscious suffering. But the Broughel case extended the right of recovery as stated in the text.

9—**Swift v. Johnson, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161;** Munro v. Pac. Coast Dredging Co., 84 Cal. 515, 18 Am. St. Rep. 248; Pierce v. Conners, 20 Colo. 178, 46 Am. St. Rep. 279; Augusta Factory v. Barnes, 72 Ga. 317, 53 Am. Rep. 838; Malott v. Shimer, 153 Ind. 35, 74 Am. St. Rep. 278; Tucker v. State, 89 Md. 479, 45 L. R. A. 181; Chicago R. Co. v. Zurnecke, 59 Neb. 689, 55 L. R. A. 160; Whitford v. Panama R. Co., 23 N. Y. 456; Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 79 Am. St. Rep. 635, 51 L. R. A. 235; Perham v. Portland Electrical Co., 33 Ore. 451, 72 Am. St. Rep. 730, 40 L. R. A. 799.

In Louisiana, both elements of damage are combined; and the verdict should cover the expenses incurred, and loss of service to majority, plus "the amount which the daughter was entitled to recover at the moment of her death." LeBlanc v. Sweet, 107 La. 355, 90 Am. St. Rep. 303.

In the Federal Act of 1910 also both elements of damage are given. St Louis I. M. & S. R. Co. v. Craft, 237 U. S. 648.

"The difficulty upon this point arises from the employment of the word 'pecuniary' in the statute;

It results that from the death of an adult son or daughter, whose labor and earnings have ceased to be the legal property of the father, only such damages can be recovered as fairly represent the contributions which the child would be likely to make to the parents, considering his earning capacity and their needs and the assistance which he had been giving them during his life.[10]

but it was not used in a sense so limited as to confine it to the immediate loss of money or property; for if that were so, there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature, which have been cut off by the premature death of the person from whom they would have proceeded; and the word pecuniary was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value. But infant children sustain a loss from the death of their parents, and especially of their mother, of a different kind. She owes them the duty of nurture, and intellectual, moral and physical training, and of such instruction as can only proceed from a mother. That is, to say the least, as essential to their future well-being in a worldly point of view, and to their success in life, as the instruction in letters and other branches of elementary education which they receive at the hands of other teachers who are employed for a pecuniary compensation. * * * The injury in these cases is not pecuniary in a very strict sense of the word, but it belongs to that class of wrongs as distinguished from injuries to the feelings and sentiments; and in my view, therefore, it falls within the terms as used in this statute." Tilley v. Hudson River R. Co., 24 N. Y. 475.

The age, condition, earning capacity and expectation of life are all to be considered, but the assessment of damages "does not admit of fixed rules and mathematical precision, but is left to the sound discretion of the jury." Railroad v. Spence, 93 Tenn. 173, 42 Am. St. Rep. 907.

The right of action by the next-of-kin is a personal and not a property right; and hence does not pass to his administrator. Gilkeson v. Mo. Pac. R. Co., 222 Mo. 173, 24 L. R. A. (N. S.) 844. *Contra,* Meekin v. Brooklyn Heights R. Co., *supra;* Thomas v. Maysville Gas Co., 112 Ky. 569.

10—McCullough v. Chicago & Rock Island R. Co., 160 Iowa 524, 47 L. R. A. (N. S.) 223.

It further results that for the death of a young child the parents can only recover what the tribunal finds to be the pecuniary loss to them. Since in many cases it is quite evident that there is no pecuniary loss, or even that the child who has been killed was certain to cause a much greater expense than pecuniary benefit to his parents, the court holding this theory of the remedy have very frequent occasion to set aside as excessive verdicts in which the jury have sought to give redress for the wounded feelings of the parents, and to punish the wrongdoer.[11]

The damage allowable is not confined to what will be suffered during minority, but includes what may reasonably be expected to accrue thereafter.[12]

§ 138. **For the seduction of a daughter.** There is one class of cases arising out of an injury to a child in which some special considerations apply: that for the seduction of a minor daughter.

The real ground of distinction between these cases and those for an injury done to a boy or girl by violence or by negligence is that in the latter case the victim of the wrong himself has a cause of action which affords the primary redress. But in case of seduction the daughter, having

11—**Fox v. Oakland R. Co., 118 Cal. 55, 62 Am. St. Rep. 216;** Morgan v. So. Pac. R. Co., 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71; Graham v. Consolidated Traction Co., 62 N. J. L. 82, 64 N. J. L. 10, 65 N. J. L. 539 (in this case four successive verdicts were set aside); Little Rock R. Co. v. Barker, 33 Ark. 350, 34 Am. Rep. 44; Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Aaron v. Mo. & Kan. Tel. Co., 89 Kan. 186, 45 L. R. A. (N. S.) 309; Ill. Central R. Co. v. Watson, 117 Ky. 588, 78 S. W. 175; Agricultural Asso. v. State, 71 Md. 86, 17 Am. St. Rep. 507; Scherer v. Schlaberg, 18 N. Dak. 421, 24 L. R. A. (N. S.) 520.

The note in 18 Ann. Cas., pp. 1225 to 1236, gives an extensive list of verdicts for the death of children sustained, and others set aside, giving in each case the amount of the verdict and the circumstances of the case.

And see also the notes, L. R. A. 1916 C 870-884; Ann. Cas. 1916 B 532.

12—Bond v. United Railroads, 159 Cal. 270, 48 L. R. A. (N. S.) 687 and note, Ann. Cas. 1912 C 870 and note.

been a consenting party to the wrongful act, can not herself maintain an action. Any redress that is given, therefore, must be given in a suit by the father.

In this class of cases, the requirement that there should be a relation of master and servant between the father and daughter, and a loss of such service resulting from the seduction, has been reduced to the merest possible technicality.[13]

The slightest acts of service rendered by the daughter to her father, "even if she has done no more than to pour his tea,"[14] or the mere right to command her services, though she has never actually rendered them, and though she may be living with strangers, and not a member of the plaintiff's family, are sufficient to constitute the necessary relation of master and servant.[15] The pregnancy of the daughter, her infection with sexual disease, or her illness by shame or grief, are sufficient to show a loss of service; and when such merely technical loss of service has been established, the damages are not at all limited to the real loss of the daughter's services. Not only her inability to work or loss of time by illness, the expense of her pregnancy or other illness, her loss of employment, are proper elements of damages, but the jury are permitted to give damages for the disgrace and sorrow caused to the father, the injury to the good name of the family, his loss of com-

13—See the note, L. R. A. 1917 E 578.

14—**Anthony v. Norton, 60 Kan. 341, 72 Am. St. Rep. 360, 44 L. R. A. 757;** Middleton v. Nichols, 62 N. J. L. 636; Lawyer v. Fritcher, 130 N. Y. 239, 27 Am. St. Rep. 521, 14 L. R. A. 700; Snider v. Newell, 132 N. C. 614; Davidson v. Abbott, 52 Vt. 570, 36 Am. Rep. 767.

15—**Martin v. Payne, 9 Johns. (N. Y.) 387, 6 Am. Dec. 288;** Clark v. Fitch, 2 Wend. (N. Y.) 459, 20 Am. Dec. 639; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Blagge v. Ilsley, 127 Mass. 191, 34 Am. Rep. 361; Boyd v. Bird, 8 Blackf. (Ind.) 113, 44 Am. Dec. 740; Simpson v. Grayson, 54 Ark. 404, 26 Am. St. Rep. 52; Emory v. Gowen, 4 Me. 33, 16 Am. Dec. 233; Hornketh v. Barr, 8 S. & R. (Pa.) 36, 11 Am. Dec. 568; Lavery v. Crooke, 52 Wis. 612, 38 Am. Rep. 768

fort in the society of his daughter, and generally such damages as will, so far as money can, compensate for the wrong done to his rights and feelings as a father to whom his daughter's character and reputation are dear.[16]

It seems evident that the principles covering the award of damages in cases of seduction are not quite the same as those discussed in the last section in relation to the damages recoverable for injuries causing the death of a child,

16—Blagge v. Ilsley, 127 Mass. 191, 34 Am. Rep. 361; Simpson v. Grayson, 54 Ark. 404, 26 Am. St. Rep. 52; Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88; Stevenson v. Belknap, 6 Iowa 97, 71 Am. Dec. 392; Middleton v. Nichols, 62 N. J. L. 636; Hamilton v. Lomax, 26 Barb. (N. Y.) 615.

In Covington St. R. Co. v. Parker, 9 Bush. (Ky.) 455, 15 Am. Rep. 725, and in Carden v. Wright, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633, the essential difference between actions for seduction and those for other injuries is clearly stated. That distinction had been denied in Trimble v. Spitler, 7 T. B. Mon. (Ky.) 394, 18 Am. Dec. 189.

It is not essential that either pregnancy or sexual disease should have resulted, if by general injury to the daughter's health the plaintiff lost her service. Abraham v. Kidney, 104 Mass. 222, 6 Am. Rep. 220; Blagge v. Ilsley, 127 Mass. 191, 34 Am. Rep. 361.

In White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 202, venereal disease was held to be sufficient without pregnancy.

That defendant caused an abortion to be performed on the daughter is admissible to aggravate the damages. White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100.

The seduction itself is the cause of action, and not the resulting damages; the statute of limitations therefore runs from the time of the seduction. Dunlap v. Linton, 144 Pa. St. 335.

In Lawyer v. Fritcher, 130 M. 239, 27 Am. St. Rep. 521, 14 L. R. A. 700, the plaintiff's consent that his daughter should go with the defendant for the purpose of marrying him was held to be no defense to the action, where defendant was already married, and obtained the consent by false statements in that respect.

Some of the cases speak of the general damages permissible in these cases as punitive, and accordingly permit evidence of the financial ability of the defendant to go to the jury. Clem v. Holmes, 33 Gratt. (Va.) 722, 36 Am. Rep. 793; Lavery v. Crooke, 52 Wis. 612, 38 Am. Rep. 768.

Loss of general social standing is provable as an element of damage; but not that particular persons have refused to associate with plaintiff's daughter. Hawn v. Banghart, 76 Iowa 683, 14 Am. St. Rep. 261.

in that the injury to the feelings is usually a far more important element in the damages than any mere pecuniary loss.

It may be added that it is not essential to such a cause of action that the daughter should be a minor. The basis of the action is the loss of service; if an adult daughter is in fact living with her father and rendering services to him, he can maintain the action.[17]

But if there is not the relation of service in fact, and there is not the legal right to the service because of the adult age of the daughter, there is nothing on which to base the common law action.[18] In that case, the situation is the same as in any case where an adult person suffers an injury from wrongful acts in which he participated and is therefore without redress.

Statutes have been passed in many states giving a woman a right to maintain a suit for her own seduction. In some states the right of the father has been extended so as to give him a right of action for seduction without requiring a loss of services to be alleged or proved. But such statutory rights of action do not take away the common law rights as above stated.[19]

§ 139. The rights and duties of the mother. So long as

17—Anthony v. Norton, 60 Kans. 341, 72 Am. St. Rep. 360; Mercer v. Walmsley, 5 Har. & J. (Md.) 27, 9 Am. Dec. 486; Beaudette v. Gagne, 87 Me. 534; Vossel v. Cole, 10 Mo. 634, 47 Am. Dec. 136; Lipe v. Eisenlord, 32 N. Y. 729.

18—**Mercer v. Walmsley, 5 Har. & J. (Md.) 27, 9 Am. Dec. 486;** Ogborn v. Francis, 44 N. J. L. 441, 43 Am. Rep. 394; McDaniel v. Edwards, 7 Ired. L. (N. C.) 408, 47 Am. Dec. 331.

A step-father cannot recover for the seduction of his step-daughter, who was in the actual service of another, since he had neither the *de facto* or the *de jure* service of the girl. Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338.

And in Louisiana, where the father has no legal right to the proceeds of the labor of a daughter, the right to recover for injury to the feelings does not exist. Kaufman v. Clark, 141 La. 316, L. R. A. 1917 C 756 and note.

19—Stevenson v. Belknap, 6 Iowa 97, 71 Am. Dec. 392.

the father is living, and his parental relation to the child has not been destroyed by any conduct by which he has lost the right to its custody, the parental rights are vested in him and in him alone.

The mother can not maintain an action to recover her child's earnings, she can not sue for injury to her parental rights by any personal injury done to the child, and she is not liable for the support of the child.[20]

And as to the custody of the children, as already stated, she can not maintain an action to obtain it without showing that the father has forfeited the right by his misconduct, or at least that the children will be better cared for and brought up if placed in her custody instead of in his.[21]

But if the father is dead, the mother becomes the head of the family. By his death she loses the disabilities of coverture, and becomes the sole parent of the children.

The older English cases and some American ones, following the general tendency of the times to minimize the rights of women in their domestic relations, limited and questioned her title to succeed to the parental rights of the husband; but that unfair discrimination has yielded to the more just view taken of the rights of wives and mothers in our modern courts, and it is held in the great majority of recent cases that the widowed mother can sue for her child's earnings,[22] for loss of earnings and for expenses

20—**Soper v. Igo, 121 Ky. 550, 123 Am. St. Rep. 212, 1 L. R. A. (N. S.) 362, 11 Ann. Cas. 1171:** Gilley v. Gilley, 79 Me. 292, 1 Am. St. Rep. 307; Logan v. Murray, 6 S. & R. (Pa.) 175, 9 Am. Dec. 422.

21—*Ante*, § 130.

22—**Matthewson v. Perry, 37 Conn. 435, 9 Am. Rep. 339;** Hollingsworth v. Swedenborg, 49 Ind. 378, 19 Am. Rep. 687; Hammond v. Corbett, 50 N. H. 501, 9 Am. Rep. 288; Osborn v. Allen, 26 N. J. L. 388.

Contra. "If it be intended to declare that the mother, after the death of the father, is entitled to the earnings of a minor child, in the same manner as the father when alive is entitled to them, the decision cannot be sustained." Pray v. Gorham, 31 Me. 240.

The early cases in Pennsylvania also deny the right of the widowed mother to her child's earn-

incurred because of an injury to a son or daughter,[23] or for general damages for the seduction of a daughter,[24] in the same way, and with precisely the same rights, that the father could do if he were living.

If the father is still living, but has abandoned his family, and thereby cast their custody and support upon the mother, and still more clearly if the parents have been divorced and the custody of the children awarded to her, the same result follows. She, and not he, is now entitled to be considered the parent of the child, and the rights which the father has abandoned or forfeited are vested in her.[25]

ings (Com. v. Murray, 4 Binn. (Pa.) 487, 494, 5 Am. Dec. 412; Passenger R. Co. v. Statler, 54 Pa. St. 375, 93 Am. Dec. 714); but the mother's right has now been established in Pennsylvania by statute. O'Brien v. Philadelphia, 215 Pa. St. 407.

23—**McGarr v. National Worsted Mills, 24 R. I. 447, 96 Am. St. Rep. 749, 60 L. R. A. 122;** Horgan v. Pac. Mills, 158 Mass. 402, 35 Am. St. Rep. 504; Amos v. Atlanta R. Co., 104 Ga. 809; Bradley v. Sattler, 156 Ill. 603; **Ohio R. Co. v.** Tindall, 13 Ind. 366, 74 Am. Dec. 259; County Commissioners v. Hamilton, 60 Md. 340, 45 Am. Rep. 739.

24—Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Malone v. Topfer, 125 Md. 157, Ann Cas. 1916 E 1272 and note.

If the father was living at the time of the seduction, but died soon after, it has been held that the mother has no right of action; since the right vested in the father as a right of action for a personal tort which does not survive his death. Vossel v. Cole, 10 Mo. 634, 17 Am. Dec. 136; Logan v. Murray, 6 S. & R. (Pa.) 175, 9 Am. Dec. 422 and note.

But see, *contra*, Coon v. Moffett, 3 N. J. L. 583, 4 Am. Dec. 392 and note.

25—**Yost v. Grand Trunk R. Co., 163 Mich. 564, 31 L. R. A. (N. S.) 519, Ann. Cas. 1912 A 988;** Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199; Clay v. Shirley, 65 N. H. 644; Clark v. No. Pac. R. Co., 29 Wash. 139, 59 L. R. A. 508.

Under a statute authorizing a father or widowed mother to transfer the custody of their children by deed the father cannot, by deed to his parents, give them a title superior to that of the mother. On his abandonment of his parental rights they pass to her; and a statute depriving her of them without cause would be unconstitutional. Tillman v. Tillman, 84 S. C. 552, 26 L. R. A. (N. S.) 781.

In McGarr v. National Worsted Mills, 24 R. I. 447, 96 Am. St. Rep.

§ 140. The widowed mother's duty of support. As to the duty of support, the obligation of the widowed mother has been held by some courts to be not quite so great as that of the father. It is said that it is his absolute duty to support his children, and that even if they have property of their own, he has not the right (except by virtue of an order of court, which will be spoken of later) to charge the support of the children to their property. But the mother is not supposed to be so well able to support the children as the father. While of necessity she must support them if she can, and if they have no other means of support, she is not under legal obligation to support them if they have sufficient means, or if they are able to earn their own support.[26]

But this distinction between the duty of the parents is denied in some well-considered cases, and it is held that the duty resting on the widowed mother is exactly the same in principle as that resting on the father during his life, however much difference there may be in the application of the duty; and that the controlling question in each case is one of the actual ability of the parent to furnish the necessary support.[27]

749, 60 L. R. A. 122, the mother was held entitled to sue where, by agreement between her and the father, she had assumed the care and support of the family, and received their earnings, though he did not appear to have left the family.

But where the parents had been divorced, and the custody of the children given to the mother, but with no order concerning their support, as the father is still bound to support the children, it has been held that she cannot sue for injuries to them. Keller v. St. Louis, 152 Mo. 596, 47 L. R. A. 391.

26—2 Kent's Com. 191; **Re Besondy, 32 Minn. 385, 50 Am. Rep. 579;** Guion v. Guion, 16 Mo. 48, 57 Am. Dec. 223.

She does not become liable for her children's support by their father's failure to support them, or by his confinement in jail. Gleason v. Boston, 144 Mass. 25.

27—**Alling v. Alling, 52 N. J. Eq. 92;** Cooper v. McNamara, 92 Iowa 243; Fulton v. Fulton, 52 Ohio St. 229, 49 Am. St. Rep. 720, 29 L. R. A. 678.

§ 141. The rights and duties of parents in relation to illegitimate children. The law concerning the rights of illegitimate children has undergone a gradual alteration in the course of time, as have many parts of the law of domestic relations, and the change in this respect, as in others, is in the direction of greater humanity.

At the common law an illegitimate child was *nullius filius*, the son of nobody, not even of the mother.

He had not even a name, until he acquired one by use and reputation.

To use the common expression, he had no inheritable blood; he could not inherit from his own mother; still less from his reputed father or from his mother's relatives. He could neither be an heir nor have an heir until he had heirs of his own body.[28]

This harsh doctrine of the English common law has been generally altered in the United States; the alteration in many of the states has been by statute; in some it has been by decisions of the courts establishing a local common law differing from the older law stated above.

The common and fundamental rule adopted in the United States is the reasonable proposition that the illegitimate child is the son of his mother; that he takes her settlement, her domicil and her name as his, and that he is connected with her by ties of inheritable blood.

He inherits therefore from her and she from him.[29] And

28—1 Bl. Com. 459; 2 Kent's Co. 212; Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553; Hicks v. Smith, 94 Ga. 809; Cooley v. Dewey, 4 Pick. (Mass.) 93, 16 Am. Dec. 326.

But the English courts departed from entire consistency when they refused to permit a man to marry his sister's illegitimate daughter. Harris v. Jeffell, 1 Ld. Raym. 681 (1701).

29—**Eaton v. Eaton, 88 Conn 269.** And where by statute an illegitimate child, whose parents after his birth intermarry and acknowledge him, is declared "legitimate to all intents and purposes," the incapacity of illegitimacy is wholly done away and he takes the legal settlement of his father. Monson v. Palmer, 8 Allen (Mass.) 551.

in many of the states he inherits also from the father, if he has recognized him as his child, though there has been no legitimation by marriage of the parents.[30]

§ 142. Inheritance between illegitimate child and collateral relatives. But when we go one step farther and inquire as to the rights of an illegitimate child to inherit *through* the mother; that is, from her parents; or to inherit or transmit inheritance collaterally, as to or from children of the same mother, or to or from the collateral relatives of the mother, there is a wide diversity, depending chiefly on the diverse language of the several statutes.

In those states where the rule is most liberal, the bastard child has, *on the mother's side*, all the rights of inheritance that a legitimate child has—both lineal and collateral.[31]

In states where the modification of the common law is due to statute, there is a tendency to restrict the terms of the statute on the general principle that statutes derogatory of the common law are to be strictly construed.

Applying such strict construction, it has been held in some states that the bastard inherits from the mother alone,[32] and in some that he inherits only from the mother and her ancestors, that is, from her or through her.[33]

Whether he can inherit from other children of the same mother is a question on which the decisions vary greatly. It would seem that the majority of decisions are against such right. But all these questions can be determined only by examining the statutes and decisions of each state.[34]

30—Record v. Ellis, 97 Kan. 754, Ann. Cas. 1917 C 822 and full note.

31—**Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553;** Bales v. Elder, 118 Ill. 436; Messer v. Jones, 88 Me. 349.

32—Williams v. Kimball, 35 Fla. 49, 48 Am. St. Rep. 238, 26 L. R. A. 746; Jackson v. Jackson, 78 Ky. 390, 39 Am. Rep. 246; Sanford v. Marsh, 180 Mass. 210; Reynolds v. Hitchcock, 72 N. H. 340.

33—Stevenson v. Sullivan, 5 Wheat (U. S.) 207.

34—Messer v. Jones, 88 Me. 349. "One illegitimate child can inherit from another illegitimate child of the same mother." Burlington v. Fosby, 6 Vt. 83, 27 Am. Dec. 535.

As to illegitimate children taking by will, the question is simply as to the proper interpretation of the will, and the ascertainment of the testator's intention. If by name, or by other unmistakable designation, illegitimate children are made legatees, they will of course take as such. A bequest to "my children," or to the children of another person, will ordinarily be construed as referring only to legitimate children; but if the testator or other person had no legitimate children, or if the terms of the will, together with the facts relating to the children in question and the testator's attitude toward them, indicate that illegitimate children were meant to be included, that intention will be carried out.

The whole question is that of the fair intention of the testator.[35]

§ 143. As to the custody of illegitimate children. As illegitimate children are the children of their mother, and (in legal intention) of no one else, she is their natural guardian, and has a right to their custody and control superior to that of the putative father as well as to that of all other persons.[36] But of course this right will be set

35—Brisbin v. Huntington, 128 Iowa 166, 5 Ann. Cas. 931; Hayden v. Barrett, 172 Mass. 474, 70 Am. St. Rep. 295.

In England illegitimate children cannot be included under a will to "children" even where the circumstances show that the testator must have intended them to take. Re Pearce, (1914) 1 Ch. 254, Ann. Cas. 1916 A 410, 8 Brit. Rul. Cas. 279 and note.

But in Connecticut the presumption is that they are included. Eaton v. Eaton (two cases), 88 Conn. 269, 286.

See the exhaustive note as to whether the word "child" includes an illegitimate child in wills, deeds and statutes, Ann. Cas. 1918 B 249-273.

36—Lipsey v. Battle, 80 Ark. 287; Perry v. State, 113 Ga. 936; Dalton v. State, 6 Blackf. (Ind.) 357; Wright v. Wright, 2 Mass. 109; Ill. Cent. R. Co. v. Saunders, 104 Miss. 257, 44 L. R. A. (N. S.) 1137 and note; Friesner v. Symonds, 46 N. J. Eq. 521; Re Doyle, Clarke Ch. (N. Y.) 154.

That on the death of the mother the putative father has a claim to the child's custody superior to that of the mother's relatives, see

aside in case of her unfitness, or when she is seeking to recover the child's custody by law, and the court deems it distinctly for the child's welfare to remain with the person who now has it.[37]

§ 144. As to their maintenance and support. In this respect, too, the mother is *the* parent of an illegitimate child. Upon her rests the primary duty of maintenance.[38]

The putative father is not liable at all for the support of the illegitimate child.

His moral obligation has been held, however, to be a sufficient consideration for his express agreement to support the child; so that if he promises to pay the mother for its support, or to pay any third person who may have the care of it, such promise is enforceable. But without the express agreement he is not liable, either to the mother or to anybody else.[39]

Pote's Ap., 106 Pa. St. 574, 51 Am. Rep. 540.

Under a statute giving the right to sue for the death of "a minor child" to the father if living, and if not to the mother, the mother of an illegitimate child may sue for his death though the putative father is living. Hadley v. Tallahassee, 67 Fla. 436, Ann. Cas. 1916 C 719 and note.

37—Purinton v. Jamrock, 195 Mass. 187, 18 L. R. A. (N. S.) 926; Hesselman v. Haas, 71 N. J. 689; Lipsey v. Battle, 80 Ark. 287.

And if the father, by marrying the mother and acknowledging the child, legitimates it, the superior right of the mother yields to the right of the father as in case of a legitimate child. Allison v. Bryan, 21 Okla. 557, 18 L. R. A. (N. S.) 931, 17 Ann. Cas. 468. But see the same case, 26 Okla. 520, 30 L. R. A. (N. S.) 146.

38—But it was said in State v. Tieman, 32 Wash. 294, 98 Am. St. Rep. 854: "At the common law, neither a father nor mother was under any legal obligation to support an illegitimate child."

39—**Todd v. Weber, 95 N. Y. 181, 47 Am. Rep. 20**; Benge v. Hiatt, 82 Ky. 666, 56 Am. Rep. 912; Beach v. Voegtlen, 68 N. J. L. 472; Burton v. Belvin, 142 N. C. 151; Stumpf's Appeal, 116 Pa. St. 33.

The statement that the moral obligation is alone a valid consideration is hardly in accord with modern views as to the nature of a legal consideration. In most of the cases there is a sufficient consideration to support the promise from the surrender of the child to the father by the mother or its support by some relative.

There are statutes in all or nearly all the states by which the mother of an illegitimate child, or, if she is a pauper or likely to become one, the public authorities, may institute a special action, semi-civil and semi-criminal in its nature, called a bastardy prosecution, against the man claimed to be the father of the child, and on proof of the fact the court has power to require him to give bond to pay such sum toward the mother's expense of childbirth, and such stated allowance for the child's support until it reaches the age of self-support, as the court may fix.[40]

This statutory liability, existing only under the judgment of the court, is the limit of the father's liability, except by his express agreement, or his legitimation of the child by marriage with the mother.

40—Simmons v. Bull, 21 Ala. 501, 56 Am. Dec. 257; Marston v. Jenness, 11 N. H. 156; State v. Nestaval, 72 Minn. 415.

PART VI
GUARDIAN AND WARD

CHAPTER XIX

THE VARIOUS KINDS OF GUARDIANS AND THEIR APPOINTMENT.

§ 145. The ancient common law guardianships. "By the common law there are four manner of guardians, viz.: guardian in chivalry, guardian by nature, as the father of the eldest son, guardian in socage, and guardian *per cause de nurture;* all frequent in our books."[1]

Guardianship in chivalry was one of the rights of the feudal lord. If a tenant by knight service died, leaving an heir male under the age of twenty-one, or an heir female under the age of fourteen, the lord had the custody of the body and estate of the heir, and the right to take the income of the estate, or the sum to be realized by the marriage of the female ward, for his own benefit, as a recompense for the loss of the military service incident to the tenure. This differed from all other forms of guardianship in that it was a privilege of the guardian for his own benefit, instead of a trust for the ward's benefit. It was abolished, together with the whole structure of military tenures, by the statute 12 Car. 11., c. 24.[2]

Guardianship in socage was incident to tenure in socage, as guardianship in chivalry was to tenure by knight service. Whenever an infant under the age of fourteen

1—Co. Litt., 88 b; Reeve on Dom. Rel., 311-315; **Mauro v. Ritchie, 3 Cranch (U. S. C. C.) 117, 16 Fed. Cas. 1171.**

For a fuller treatment of the entire topic of Guardian and Ward, see the article under that title in the American & English Encyclopedia of Law, 2d ed., vol. 15, written by the present author, and which the publishers of that work have kindly allowed him to use freely in preparing this.

2—Co. Litt. 74 b; 2 Bl. Com. 77.

years inherited an estate in socage, his nearest relative to whom the estate itself could not descend was guardian of the land until the infant arrived at the age of fourteen, when the trust terminated.[3] Since tenure in socage does not exist in the United States, this species of guardianship has no existence here, except in a modified form in New York.[4]

The father was *guardian by nature* of the person of his heir apparent or heiress presumptive during the minority. This guardianship of the person was an exception to the powers of the guardian in chivalry, so long as the father lived.[5]

The father, and after his death the mother, were *guardians for nurture* of the persons of all their children up to the age of fourteen years.[6] The last two species of guardianship were of the person only, and both have been merged in the modern guardianship by nature.

§ 146. Modern forms of guardianship. *1. Guardianship by nature.* By the later common law the father is recognized as the natural guardian of his legitimate children during their minority,[7] and is entitled to their custody and control.

3—Co. Litt., 87 b; 1 Bl. Com. 461; 2 id. 88; 2 Kent's Com. 222; Reeve on Dom. Rel., 311-314; Snook v. Sutton, 10 N. J. L. 133.

4—Combs v. Jackson, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568; Emerson v. Spicer, 46 N. Y. 594; Re Hynes, 105 N. Y. 560; Foley v. Mut. Life Ins. Co., 138 N. Y. 333, 34 Am. St. Rep. 456, 20 L. R. A. 620.

5—Combs v. Jackson, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568.

6—Ratcliffe's case, 3 Coke 37 a; Lord v. Hough, 37 Cal. 657; Kline v. Beebe, 6 Conn. 500.

7—**Hernandez v. Thomas, 50 Fla. 522, 111 Am. St. Rep. 137, 2 L. R. A. (N. S.) 203, 7 Ann. Cas. 446;** Taylor v. Jeter 33 Ga. 195, 81 Am. Dec. 202; Shanks v. Seamonds, 24 Iowa 131, 92 Am. Dec. 465; Hibbette v. Baines, 78 Miss. 695, 51 L. R. A. 839; Tiffany v. Wright, 79 Neb. 10; State v. Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 399; Giffin v. Gascoigne, 60 N. J. Eq. 256; People v. Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; Fonda v. Van Horne, 15 Wend. (N. Y.) 631,

Upon the death of the father, or upon his being adjudged unfit, the guardianship passes to the mother.[8] And according to some authorities the mother's title is paramount while the child is in tender infancy.[9]

By statute in several states the parents are declared to be the joint natural guardians of their minor children, with equal powers, rights, and duties in regard to them.[10]

There is some authority for the statement that after the death of both parents the grandfather or grandmother, if next of kin, is the guardian by nature, but this seems to be a loose and inaccurate dictum.[11]

30 Am. Dec. 77; Haynie v. Hall, 5 Humph. (Tenn.) 290, 42 Am. Dec. 427.

See also *ante*, § 130.

8—Mathewson v. Perry, 37 Conn. 435, 9 Am. Rep. 339; Hammond v. Corbett, 50 N. H. 501, 9 Am. Rep. 88; and see *ante*, § 139.

9—Com. v. Smith, 1 Brews. (Pa.) 547; State v. Kirkpatrick, 54 Iowa 375; Paine v. Paine, 4 Humph. (Tenn.) 523.

By statute in New Jersey, the custody of children within the age of seven years is transferred from the father to the mother. See Bennett v. Bennett, 3 N. J. Eq. 114; State v. Baird, 18 N. J. Eq. 194.

"A boy of three years of age may properly be deemed to be of such tender age that considerations of his welfare call for his having a mother's care, but the same cannot be said when the child has reached the age of five years." Sinclair v. Sinclair, 47 Misc. (N. Y.) 230.

10—Gen. St. of Conn., 1918, § 4861; Code of Iowa, 1897, § 3192; G. S. Kans., 1915, § 5041; Rev. Stat. Neb. 1913, § 1632; Domestic Relations Law (N. Y.) § 81.

It is said in Sinclair v. Sinclair, 47 Misc. (N. Y.) 230, "the domestic relations law has not effected any substantial change in the husband's paramount right, founded upon his primary duty to support the family."

And in Ackeret v. Minneapolis, 129 Minn. 190, L. R. A. 1915 D 1111, Ann. Cas. 1916 E 897, that "it was neither the purpose nor the effect of these statutes to make any material change in the duty imposed upon the husband and father to maintain and support the family."

11—"Although some books speak only of the father, or in the case of his death the mother, as guardian by nature (1 Bl. Com. 461, 2 Kent's Com. 219), it is clear that the grandfather or grandmother, when next of kin, is such a guardian. Hargrave's note 66 to Co. Litt. 88 b.; Reeve on Dom. Rel., 315." Lamar v. Micou, 114 U. S. 218.

The authorities here cited for the guardianship of grandparents

In England there has been considerable conflict of authority upon the question whether, in the case of illegitimate children, the mother is the natural guardian and as such entitled to their custody. But it now seems to be well settled that, though the mother has not the same legal rights to the guardianship and custody of her illegitimate child that the father has to that of a legitimate child, yet the court in granting the custody of an illegitimate child will primarily consider the wishes of the mother, provided the fulfillment of her desires in the matter will not be detrimental to the welfare of the child.[12] In the United States

refer clearly to the ancient guardianship by nature over the heir only. The modern natural guardianship over all the children is more clearly akin to the ancient guardianship for nurture, which was confined to the parents. Reeve expressly makes this distinction; pp. 315-316. Mathews v. Wade, 2 W. Va. 464, denies that the grandparents succeed to the rights of the parents, or have a primary right to be appointed guardian. The above statement in Lamar v. Micou has been followed in Re Benton, 92 Iowa 202, 54 Am. St. Rep. 646; Holmes v. Derrig, 127 Iowa 625.

It may often happen that an orphan is cared for by its grandparents, who will thus have a *de facto* custody and control which, as long as it is properly exercised, the courts will protect against a third party having no better right; and grandparents so situated would naturally be preferred in the appointment of a legal guardian. This is doubtless the extent of the true doctrine as to the rights of grandparents.

12—Barnardo v. McHugh (1891) A. C. 388; Regina v. Nash, L. R. 10 Q. B. Div. 454; in re Ulee, 54 L. T. (N. S.) 286. See also Strangeways v. Robbinson, 4 Taunt. 498.

It has been said that where the putative father of an illegitimate child has its custody, fairly and peaceably, the court will not take it away from him and give it to the mother. Lord Kenyon, C. J., in Rex v. Moseley, 5 East 224, note a. See, also, the opinion of Lord Ellenborough in Rex v. Hopkins, 7 East 579. And see in re Lloyd, 3 M. & G. 547, 42 E. C. L. 288; Ex p. Knee, 1 B. & P. N. R. 148.

But where the father has obtained possession of the child by force or fraud, the court will interfere to put matters in the same situation as before. Lord Kenyon, C. J., in Rex v. Moseley, 5 East 224, note a; Rex v. Soper,

the mother is the natural guardian of her illegitimate children.[13]

The right of the natural guardian to the custody and control of the ward is always subject to control by the courts, and he will be removed from the guardianship, or refused the custody of the child in habeas corpus or other proceedings to determine the right of custody, for such unfitness or misconduct as imperils the child's welfare, which is always the supreme consideration, and prevails over any legal rights of the guardian.[14]

5 T. R. 278; Rex v. Hopkins, 7 East 579; Barnardo v. McHugh, (1891) A. C. 388.

Where a child is old enough to exercise a discretion the court will allow it to choose for itself, and will not permit the mother to take it by force against its will. In re Lloyd, 3 M. & G. 547, 42 E. C. L. 288.

13—Wright v. Wright, 2 Mass. 109. See *ante*, §§ 141 and 143.

14—In England courts, in the exercise of their common law jurisdiction, could not deprive the natural guardian of a child of its custody, unless by gross misconduct he or she had forfeited the right to it. A child would not be given to its natural guardian if it would thereby be exposed to cruelty or gross corruption. Rex v. Greenhill, 4 Ad. v. El. 624, 6 Nev. & M. 244, 31 E. C. L. 153. But the immoral conduct of such a guardian, to authorize the court in depriving him of the custody of his child, must have been of such a nature as would be liable to contaminate and corrupt the morals of the child. In re Spence, 2 Phill. 247; in re Moore, 11 Ir. C. L. 1.

So a father was held to be entitled to the custody of the children as against the mother, though he was living in adultery, where it appeared that he never brought his mistress to his house or in contact with his children, Rex v. Greenhill, 4 Ad. & El. 624, 6 Nev. & M. 244, 31 E. C. L. 153; Ball v. Ball, 2 Sim. 35; and though he refused to the mother access to the child, and kept it concealed from her. Ball v. Ball, 2 Sim. 35.

A court of chancery, in the exercise of a common law jurisdiction in habeas corpus, will not interfere with the father's right to the control and education of his children unless (1) by gross moral turpitude he forfeits his rights or (2) he has abdicated his parental authority by his conduct or (3) he seeks to remove the wards of court from its jurisdiction. In re Agar-Ellis, 24 Ch. D. 317, explained in Reg. v. Gyngall, (1893) 2 Q. B. 241.

In England certain statutes have been enacted which authorize the courts under certain circumstances to grant the custody of a child away from its natural

guardian, though such guardian has not been guilty of misconduct that would have disentitled him or her to the custody of the child at common law. Reg. v. Gyngall, (1893) 2 Q. B. 232; In re A and B, (1897) 1 Ch. 786.

A court having chancery jurisdiction is not confined by the strict rule of the common law, but may remove a child from the custody of its natural guardian when it is shown that such guardian has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position as to render it not merely better, but clearly right for the welfare of the child in some serious and important respect, that his rights should be suspended or superseded. In re Flynn, 2 De G. & Sm. 457; In re McGrath, (1893) 1 Ch. 143; Reg. v. Gyngall, (1893) 2 Q. B. 232. See also Barry v. Barry, 1 Molloy 210.

Chancery has taken the custody of infants from the father for the father's unfitness; Ex. p. Mountfort, 15 Ves. Jr. 445; Wellesley v. Wellesley, 2 Bligh N. S. 128; where he was in constant habits of drunkenness and blasphemy, poisoning the infants' minds with irreligion, De Manneville v. De Manneville, 10 Ves. Jr. 52; for open immorality of life and immoral training, Wellesley v. Beaufort, 2 Russ. 28; where he had deserted them, and was not of ability to maintain them, Matter of England, 1 Russ. & M. 499.

"Their Lordships have been very much pressed, as the courts below were, with broad judicial statements of the father's legal power over his children, and of the amount of misconduct which it requires to induce the court of chancery to interfere with him. Their Lordships are disposed to think that the facts of this case are such that, even if it had occurred early in this century, the court would have been induced to give the custody of the children to their mother. But they remarked during the argument, and wish to remark again, that no one has stated or can state in other than elastic terms the grounds on which the court should think fit to interfere. There must be a sufficient amount of peril to the welfare of the children. But that sufficient amount can hardly be fixed for one age by the standard of another. Drunkenness, for instance, is looked upon as a much graver social offence now than was the case two or three generations ago, and its effects upon the welfare of a family must be judged of accordingly. For many years the tendency of legislative action and of judicial decision, as well as of general opinion, has been to give to married women a higher status both as regards property and person; and, in family questions, to bring the marital duty of the husband and the welfare of the children into greater prominence, in both respects diminishing the powers accorded to the husband and the father. This change must necessarily affect the views of judges upon the welfare of families when they are

In some later American cases there is an evident tendency to magnify the right of the father or surviving mother, and to react from the extent to which the supposed welfare of the child has been made the sole test.

"In awarding the custody of children the paramount consideration is the welfare of the child rather than the technical legal right of the parent. While this is true, yet the court should not lightly and without good cause invade the natural right of the parent to the custody, care and control, of his infant child. * * * As against strangers, the father, however poor and humble, if of good moral character and able to support the child in his style of life, can not be deprived of the privilege by any one whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone. And as between father and mother or other near relations of the child, where sympathies of the tenderest nature may be confidently relied on, the father is generally to be preferred."[15]

called on to exercise their discretion, or, what is not a very different thing, to decide what is sufficient cause for taking children out of the custody of the father." Smart v. Smart, (1892) A. C. 425.

The American cases pay less regard to the legal rights of the parent than to the child's welfare. **Chapsky v. Wood, 26 Kans. 650, 40 Am. Rep. 321;** Re Pryce, 85 Kan. 556, 41 L. R. A. (N. S.) 564 and 50-page note; Hutchinson v. Hutchinson, 124 Cal. 677; Andrino v. Yates, 12 Idaho 618; Cowls v. Cowls, 8 Ill. 435, 44 Am. Dec. 708; Hussey v. Whiting, 145 Ind. 580, 57 Am. St. Rep. 220; Risting v. Sparboe, 179 Iowa 1133, L. R. A. (1917) E 318; State v. Smith, 6 Me. 462, 20 Am. Dec. 324; Heinemann's Appeal, 96 Pa. St. 112, 42 Am. Rep. 532; Green v. Campbell, 35 W. Va. 698, 29 Am. St. Rep. 843; Re McChesney, 106 Wis. 315. See also Re Hutchinson, 26 Ont. L. Rep. 601, Ann. Cas. (1913) B 879.

Even poverty of the parents may justify taking the children from their custody if it is so extreme as to menace the child's welfare. It will not do "to say broadly that poverty will or will not justify severance of the * * * parental relations. Poverty is relative, and the evils incident thereto are variant." Each case must be judged on its individual facts. State v. Klasen, 123 Minn. 382, 49 L. R. A. (N. S.) 597.

15—Hernandez v. Thomas, 50 Fla. 522, 111 Am. St. Rep. 137, 2

At common law natural guardianship is over the person only, and the natural guardian, as such, has no right to, or control over, the property of the ward.[16] This rule of the

L. R. A. (N. S.) 203, 7 Ann. Cas. 446.

"The case above cited is also referred to as an authority to the effect that the court would disregard the family relation, and award the custody of the child to that one of the litigants who would and could deal with it most beneficially for its welfare. * * * Such a view would take his child from the poor man and give it to his richer neighbor, who might offer to adopt it. * * * In the rightful adjustment of the family relation, the child should occupy that station of life into which he is born. If his father is poor he must share his poverty. If the father is cross and ill-tempered and occasionally inebriated, these are distressful characteristics which may make the child's life less happy; but until it is shown that they are of such force and importance as to endanger the child's welfare in that place in life into which it has pleased God to call him, their existence constitutes no reason to deprive the father of the possession of his child. The true view, and that which on the whole judgment was held in the case above cited, is that the custody of the child should remain with his parents, irrespective of greater benefits which the custody of another might secure for him, unless the character of the parents, and the environment to which the child would in their charge be subjected, is such as would actually endanger his life, health, morals or permanent happiness." Giffin v. Gascoigne, 60 N. J. Eq. 256.

See also **Hibbette v. Baines, 78 Miss. 675, 51 L. R. A. 839;** Re Campbell, 130 Cal. 380; Holmes v. Derrig, 127 Iowa 625; Weir v. Morley, 99 Mo. 494, 6 L. R. A. 672; Norval v. Zinmaster, 57 Neb. 159, 73 Am. St. Rep. 500; Re Clarke, 82 Neb. 625, 20 L. R. A. (N. S.) 171; Jamison v. Gilbert, 38 Okla. 751, 47 L. R. A. (N. S.) 1133; Fochs v. Munger, 20 N. M. 335, L. R. A. 1915 E 1019; Re Tank, 129 Wis. 629.

In Stapleton v. Poynter, 111 Ky. 264, 98 Am. St. Rep. 411, 53 L. R. A. 784, and State v. Steele, 121 La. 215, 16 L. R. A. (N. S.) 1004, and Wilson v. Mitchell, 48 Colo. 454, 30 L. R. A. (N. S.) 507, the same doctrines were applied in favor of the mother as against the paternal grandparents.

But it was held error to take a child from an aunt who was giving it an excellent home and restore it to an immoral and dissolute mother in the hope that its presence might bring about a reformation of the mother. Re Lee, 165 Cal. 279, 45 L. R. A. (N. S.) 91.

16—Williams v. Cleaveland, 76 Conn. 426; Spruance v. Darlington, 7 Del. Ch. 111; Linton v. Walker, 8 Fla. 144, 71 Am. Dec. 105; Pittsburg R. Co. v. Haley,

common law is enforced by statute in most of the United States. It follows that the natural guardian can not collect and discharge[17] nor compromise[18] claims due to the ward, make contracts in regard to his estate,[19] lease [20] or take statutory proceedings to sell[21] his land, sell personal property,[22] nor bring suit to recover his estate.[23]

§ 147. *2. Testamentary guardianship.* The Act 12 Car. II., c. 24, which abolished guardianship in chivalry, provided a substitute, and also supplied the need which was caused by the termination of guardianship for nurture at the early age of fourteen years, by the provision that a

170 Ill. 610; Shanks v. Seamonds, 24 Iowa 131, 92 Am. Dec. 465; Miles v. Boyden, 3 Pick. (Mass.) 213; Power v. Harlow, 57 Mich. 107; Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627; Jackson v. Combs, 7 Cow. (N. Y.) 36, 2 Wend. N. Y. 153, 19 Am. Dec. 568; Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; Hyde v. Stone, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Haynie v. Hall, 5 Humph. (Tenn.) 290, 42 Am. Dec. 427; McDodrill v. Pardee Lumber Co., 40 W. Va. 564.

17—2 Kent. Com. 219; Naeglin v. Cordoba, 171 U. S. 638; Spruance v. Darlington, 7 Del. Ch. 111; Linton v. Walker, 8 Fla. 144, 71 Am. Dec. 105; Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; Keeler v. Fassett, 21 Vt. 539, 52 Am. Dec. 71.

In 1787, it was held in Connecticut that the father might submit to arbitration a cause of action of his child and collect the sum awarded; Beebe v. Trafford, Kirby (Conn.) 215; but this is not now the law in that state. Williams v. Cleaveland, 76 Conn. 426.

18—Pittsburg R. Co. v. Haley, 170 Ill. 610; Houston R. Co. v. Bradley, 45 Tex. 171.

19—Jones v. Jones, 46 Iowa 466.

20—May v. Calder, 2 Mass. 55; Anderson v. Darby, 1 Nott & M. (S. C.) 369; Ross v. Cobb, 9 Yerg. (Tenn.) 463.

21—Guynn v. McCauley, 32 Ark. 97; Shanks v. Seamonds, 24 Iowa 131, 92 Am. Dec. 465; Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627; Graham v. Houghton, 30 N. J. L. 552; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Judson v. Sierra, 22 Tex. 365.

Contra, McKee v. Hann, 9 Dana (Ky.) 526.

22—McCarty v. Roundtree, 19 Mo. 345.

23—Kinney v. Harrett, 46 Mich. 87.

For the regular mode of suit by an infant through his next friend, see *ante*, § 19.

father, by deed executed in his lifetime, or by his last will and testament in writing in the presence of two or more credible witnesses, might dispose of the custody and tuition of his child or children, either born or unborn, for and during such time as they should remain under twenty-one years of age, to any persons other than Popish recusants.

At common law there was no power in any person to appoint a testamentary guardian; in England, therefore, the power rested (until the Guardianship of Infants Act of 1886) upon the terms of the statute 12 Car. II. In the United States also the power is regarded as purely statutory, resting either on local statutes or on the statute 12 Car. II., considered a part of the English law existing by adoption in the colonies.[24]

Where the statute of 12 Car. II. is in force, or where its provisions as to the power of appointment have been literally re-enacted, the power to appoint a testamentary guardian for legitimate children is in the father only, and neither the mother, the grandfather, nor any other person can make such appointment.[25]

24—Wardwell v. Wardwell, 9 Allen (Mass.) 518; Mauro v. Ritchie, 3 Cranch (U. S. C. Ct.) 147, 16 Fed. Cases 1171; Lord v. Hough, 37 Cal. 657; Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580; Ingalls v. Smith, 12 N. H. 437.

Testamentary guardianship does not exist in Iowa. Re Johnson, 87 Iowa 130.

25—Hernandez v. Thomas, 50 Fla. 512, 111 Am. St. Rep. 137, 2 L. R. A. (N. S.) 203, 7 Ann. Cas. 446; Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 202; Lamar v. Harris, 117 Ga. 993; Edwards v. Kelley, 83 Miss. 144; Re Turner, 19 N. J. Eq. 433; Camp v. Pitman, 90 N. C. 915; Ingalls v. Campbell, 18 Oreg. 461; Ex p. Bell, 2 Tenn. Ch. 327.

But if a relative other than the father, or a stranger in blood, give an estate to the minor by will, and appoint a guardian for such estate, the person so named may be treated as testamentary trustee of the property in question. Kellogg v. Burdick, 187 N. Y. 355, 13 L. R. A. (N. S.) 288.

The fact that a wife has been given the custody of a child by a divorce decree does not give her power to appoint a testamentary guardian to retain custody of the child after her death against the father. Taylor v. Jeter, 33 Ga.

In the case of illegitimate children, the father has no authority to appoint a testamentary guardian,[26] nor can the mother, except in those states where she is authorized by statute to do so, appoint a guardian for such children.[27]

It would seem that the father's right to appoint a testamentary guardian for his child may be lost by abandoning the child or by legally committing its custody and control to others.[28]

The increased regard for the rights of women which has characterized modern legislation has led to the adoption of statutes in England and in many of the United States which have equalized, or partially equalized, the rights of father and mother in regard to the power to appoint guardians for their minor children. In some states the power to appoint testamentary guardians is given to the surviving parent; in others the father can not appoint such a guardian unless the mother consents thereto; while some statutes authorize the mother to appoint a testamentary guardian to her minor children if the father dies without appointing such a guardian.[29]

195, 81 Am. Dec. 202; Re Neff, 20 Wash. 652; *contra*, Wilkinson v. Deming, 80 Ill. 342, 22 Am. Rep. 192.

26—Ramsay v. Thompson, 71 Md. 315, 6 L. R. A. 705; Blacklaws v. Milne, 82 Ill. 505, 25 Am. Rep. 339.

27—Ex p. Glover, 4 Dowl. P. C. 291; Re Kerr, 24 L. R. Ir. 59; Ord v. Blackett, 9 Mod. 116.

28—Com. v. Hearne, 10 Phila. (Pa.) 199.

29—See references to many of the statutes in Am. & Eng. Encyc. of Law, XV, 28, note 8, 29, notes 1 and 2. Add to the statutes of the first class Rev. Stat. of Conn., 1918, § 4869, and Rev. Stat. Mo. (1909), § 408.

See also as to American legislation on this point, the note, 13 L. R. A. (N. S.) 288.

In New York by the statute of 1860, making the father and mother joint guardians, the mother's guardianship continued after the father's death, and the father had no right to appoint a testamentary guardian with title superior to hers. People v. Boice, 39 Barb. (N. Y.) 307. In 1862, the legislature enacted that "no man shall create any testamentary guardianship for his child, unless the mother, if living, shall in writing signify her assent thereto." Laws of N. Y., 1862,

Under the statute of 12 Car. II. a testamentary guardian may be appointed either by deed or by will. But under the statutes of many of the states the power of appointment can be exercised by will only. Appointment by deed has always been exceptional, and appointment by will the typical and usual mode, as the name "testamentary guardianship" itself shows.

The deed or will by which the appointment of a testamentary guardian is made must be validly executed.

In England, and in the United States in the absence of a statutory provision requiring it, a will merely appointing a testamentary guardian need not be probated. But under the statutes of most of the United States a probate of the will is necessary to entitle the testamentary guardian to act.[30]

No particular form of language is necessary to the appointment of a testamentary guardian, not even the use of the word "guardian," if it clearly appears that the person is to have the custody of the child's person and property, or either.[31]

Ch. 172, § 2. This provision was repealed by Laws of 1871, Ch. 32. Laws of 1896, Ch. 272, § 51, p. 223, makes the father and mother joint guardians of their children, and provides that the surviving parent may appoint a testamentary guardian for such children. Under this statute the father cannot make any appointment of a testamentary guardian which will be effective, unless he survives the mother. Kellogg v. Burdick, 187 N. Y. 355, 13 L. R. A. (N. S.) 288 and note.

30—Kent says: "A will merely appointing a testamentary guardian need not be proved; and though the statute speaks of appointment by deed as well as by will, yet such a disposition by deed may be revoked by will; and it is evident from the language of the English statute, and from the reason of the thing, that the deed there mentioned is only a testamentary instrument in the form of a deed, to operate only in the event of the father's death." 2 Kent's Com. 225.

For the later and prevailing American rule, see Wardwell v. Wardwell, 9 Allen (Mass.) 518; Desribes v. Wilmer, 69 Ala. 25, 44 Am. Rep. 501; Dorsey v. Sheppard, 10 Gill. & J. (Md.) 192, 37 Am. Dec. 77.

31—Gaines v. Spann, 2 Brock.

As the authority is derived from the will, and the statute of Car. II. required no qualification to complete the appointment, it was not originally deemed necessary for the guardian to file a bond, receive letters of guardianship, or in any way qualify for the trust; but it is now generally required, in some cases under statutes and in some without

(U. S. C. Ct.) 81; Desribes v. Wilmer, 69 Ala. 25, 44 Am. Rep. 501.

But if the term "guardian" is not used, the intention to confer the powers of a guardian should be unequivocally indicated. Peyton v. Smith, 2 Dev. & B. Eq. (N. C.) 325; Re Van Houten, 3 N. J. Eq. 220, 29 Am. Dec. 707.

The following language has been held sufficient to constitute the persons named testamentary guardians: "I desire that my son and daughter may be under the care and direction of" a person named. Bridges v. Hales, Mosely 108.

"I desire and will that my beloved wife, E. S. * * * take and have possession of all my effects, both real and personal, and to use and live off of the profits of the same as a support for herself and minor children, * * * and the same is to be under her exclusive control for the comfort and convenience of herself and the maintenance and education of our minor children, my executors looking alone to the protection of the estate." So. Marble Co. v. Stegall, 90 Ga. 236.

A provision that the testator's sons and residuary legatees should "maintain and support, in sickness and health, their brothers during their minority, * * * and their sisters until they arrive at the age of twenty-one years or are married, in the same manner as fathers or guardians, my said children rendering due subjection as children, by labor and obedience." Balch v. Smith, 12 N. H. 437.

"I respectfully request the managers of the Protestant Orphan Asylum of this city to place my said children in the custody of D" was held to be insufficient to create D a testamentary guardian. Desribes v. Wilmer, 69 Ala. 25, 44 Am. Rep. 441.

A direction that the use of the property shall be with the testator's wife for the support of herself and the children subject to the supervision of the executors, until it can be conveniently divided between wife and children, does not constitute the executors guardians. Peyton v. Smith, 2 Dev. & B. Eq. (N. C.) 325.

A will gave specific portions of the testator's estate to his wife and each of his children, and gave his accounts to the widow for the support and maintenance of herself and children, and the education of the children. It was held that this did not create a testamentary guardianship. Massingale v. Tate, 4 Hayw. (Tenn.) 30.

statutory provisions, that the guardian appointed by will shall accept, file a bond, and receive letters of guardianship.[32]

Testamentary guardianship, unless limited by the will, extends to the person and estate of the ward, and in its nature and extent is identical with general guardianship conferred by appointment of a court.[33]

At the common law, the right of a widowed mother to the custody of her children was taken away by the appointment of a testamentary guardian; but this has been very commonly altered by statute both in England and in the American states.[34]

§ 148. *3. Guardianship by judicial appointment.* The king as *parens patriae,* or in the United States the state as exercising those paternal powers necessary to the public welfare, has the right and owes the duty to care for the persons and property of infants. In England this jurisdiction was delegated to the court of chancery, and has become a settled part of chancery jurisprudence.

Chancery guardianship was generally adopted in the United States. In nearly all the states, in the absence of countervailing statutes, courts having equity powers have a jurisdiction over guardianships similar to that possessed by the English court of chancery.

The jurisdiction of chancery is very broad. It has authority to appoint a guardian to orphaned children where

32—**Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580;** Murphy v. Superior Court, 84 Cal. 592; Wadsworth v. Connell, 104 Ill. 369; Davidson v. Koehler, 76 Ind. 398.

33—Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580; Re Grimes's estate, 79 Mo. Ap. 274.

Whether a father can appoint a guardian of his child's estate without appointing a guardian of the person, or can appoint different persons to the two guardianships, *quaere.* Re Brigg's Will, 39 App. Div. (N. Y.) 485.

See *post,* note 51.

34—See the citations in note 29, especially the note in 13 L. R. A. (N. S.) 288.

no testamentary guardian has been appointed, or to those owning property and having only a natural guardian, to remove natural or other guardians for unfitness or misbehavior, and to control and direct all guardians in the performance of their trust so as to insure the proper care of the infant's person and property.[35]

But the power of the state in this respect is more commonly exercised by the creation of special courts to which the probate of wills, the administration of estates, and the like trusts are committed, and to these courts, variously entitled Probate, Orphans' or Surrogates' courts, the appointment of guardians is now generally committed in the United States.

It has been held generally that where the statute creating these courts does not expressly give exclusive jurisdiction to them, the authority conferred upon them is simply cumulative, and their jurisdiction is concurrent with that of the courts of chancery. Practically, however, the jurisdiction to appoint guardians to infants and to control them in the administration of their property is confined to the statutory courts. Courts of chancery rarely exercise their jurisdiction to appoint guardians, nor will a chancery court take upon itself the management of the estate of a ward for whom a guardian has been appointed by a statutory court, and thus supersede that court, except in extraordinary cases and for special reasons.[36]

35—Story on Eq. Jud. §§ 1337-1350; 2 Kent's Com. 227; Townsend v. Kendall, 4 Minn. 412, 77 Am. Dec. 534; opinion of Nelson, J., in Williamson v. Barry, 8 How. (U. S.) 555; Cowls v. Cowls, 8 Ill. 435, 44 Am Dec. 708; Bd. of Guardians v. Shutter, 139 Ind. 268; Re Barry, 61 N. J. Eq. 135; Monell v. Monell, 5 Johns, Ch. (N. Y.) 283, 9 Am. Dec. 298; Re Bolton, 159 N. Y. 129; Re Hubbard, 82 N. Y. 90.

36—Ames v. Ames, 148 Ill. 321; Re Barry, 61 N. J. Eq. 135.

But in New York the jurisdiction of the surrogate is still regarded as limited and peculiar, always to be exercised in subordination to the superior power of chancery. Re Bolton, 159 N. Y. 129.

§ 149. **Jurisdiction arises from ward's domicil, residence or ownership of property.** The particular court, whether a court of chancery or a statutory court, which has the right and owes the duty to appoint a general guardian—that is, a guardian over both the person and the estate of the ward—is the one within whose territorial jurisdiction the ward is domiciled.[37]

But as a guardian's authority, as a matter of strict legal right, is restricted to the country, and in the United States to the state, in which he was appointed, if an infant temporarily resides in a country or state other than that of his domicil, it may be necessary for his protection to have a legal guardian there. In such a case the residence of the infant within the state is sufficient to give to the courts of the state jurisdiction to appoint a guardian. But instead of appointing a new guardian, the courts will generally, in a spirit of comity, recognize the authority of the guardian appointed in the state or country of the infant's domicil.[38]

In addition to the general jurisdiction vested in the courts of the ward's domicil, a special jurisdiction exists wherever the ward has property, for the appointment of a guardian to secure and administer that property. Such guardianship gives no authority over the person of the ward, nor

37—**Lamar v. Micou, 112 U. S. 452;** Harding v. Weld, 128 Mass. 587; Re Brady, 10 Idaho 366; Modern Woodmen v. Hester, 66 Kans. 129; Leonard v. Putnam, 51 N. H. 247, 12 Am. Rep. 106; Re Benton, 92 Iowa 202, 54 Am. St. Rep. 546.

As to the domicil of an infant, and how it can be changed, see the extended notes, 49 L. R. A. (N. S.) 860 and 875.

38—Kelsey v. Green, 69 Conn. 291, 38 L. R. A. 471; Re Williams, 77 N. J. Eq. 478; Woodworth v. Spring, 4 Allen (Mass.) 321.

In Louisville R. Co. v. Kembrough, 115 Ky. 512, 74 S. W. 229, it was held that where a homeless and orphaned waif, who had been crippled by a railway accident, was taken to an alms house in the town where the injury occurred, the court of that county could appoint a guardian for him.

See Hayslip v. Gillis, 123 Ga. 263.

over any property except that within the jurisdiction.[39]

An appointment of a guardian by a court within whose jurisdiction the ward is not domiciled, does not reside, and has no property, is wholly void.[40]

§ 150. The selection of the guardian. The choice of the person to be appointed as guardian is peculiarly a matter for the discretion of the appointing court; and the exercise of this discretion will not be reviewed on appeal except for manifest legal errors.[41]

The welfare of the infant is the primary consideration to which all others yield,[42] but the mere wishes of an infant under fourteen years of age, while they may properly be considered, have no controlling weight.[43]

The wishes of the deceased parents of an orphan child will have careful consideration, but will not be conclusive upon the court.[44]

In making the selection, if there are no good reasons for varying the natural order, the father (except, of course, where the appointment is being made because of his own

39—Kraft v. Wickey, 4 Gill. & J. (Md.) 332, 23 Am. Dec. 569; Re Rice, 42 Mich. 528.

40—**Re Hubbard, 82 N. Y. 90;** Estate of Taylor, 131 Cal. 180; Boyd v. Glass, 34 Ga. 253, 89 Am. Dec. 252.

41—**Jones v. Bowman, 13 Wyo. 79, 67 L. R. A. 860;** Re Dunlap, 100 Me. 397; Ramsay v. Thompson, 71 Md. 315, 6 L. R. A. 705; Ex p. Dawson, 3 Bradf. (N. Y.) 130; Re Vandewater, 115 N. Y. 669; Re Johnson, 87 Iowa 130; Pote's appeal, 106 Pa. St. 574, 51 Am. Rep. 540.

But in Chadwick v. Dunham, 84 Minn. 203, and in Willet v. Warren, 34 Wash. 647, the court of last resort reviewed and reversed the probate court's exercise of its discretion.

42—Desribes v. Wilmer, 69 Ala. 25, 44 Am. Rep. 501; Re Dunlap, 100 Me. 397; Re O'Connell, 102 Iowa 355; Re Stockman, 71 Mich. 180; Willet v. Warren, 34 Wash. 647.

43—Re McChesney, 106 Wisc. 315.

44—In Re Kaye, L. R., 1 Ch. 387; Re Turner, 19 N. J. Eq. 433; Jones v. Cleghorn, 63 Ga. 335, 68 Ga. 87; Ramsay v. Thompson, 71 Md. 315, 6 L. R. A. 705; Wardwell v. Wardwell, 9 Allen (Mass.) 518; Re O'Connell, 102 Iowa 355; Re Tank, 129 Wisc. 629.

unfitness) will have the preference, then the mother, then the nearest relatives. There is no preference as between paternal and maternal relatives. But the welfare of the infant being the primary consideration, the court in appointing a guardian is not restricted to the relatives. It may appoint a stranger who is shown to be competent. Other things being equal, however, a relative will be preferred to a stranger.[45]

In the intolerant spirit which dominated English legislation and judicial action prior to the present century Roman Catholics were excluded from holding the trust of guardianship, and this rule of exclusion was inserted in the act for the creation of testamentary guardianships.

But the more tolerant spirit of modern days has abolished this discrimination, and the rule prevails in England to appoint a guardian of the faith in which the father died, and in which he wished his child to be brought up.[46]

In the United States religious discrimination has never been exercised in appointing guardians, and the only purpose of the courts has been to carry out the expressed or presumed wishes of the parents in this respect.[47]

45—For the principles governing the selection of guardians and their application to specific cases, see **Re Stockman, 71 Mich.** 180; Re Salter, 142 Cal. 412; Re Crocheron, 16 Idaho 441, 33 L. R. A. (N. S.) 1868 and note; Re O'Connell, 102 Iowa 355; Underhill v. Bowman, 9 Paige Ch. (N. Y.) 202; Re Burdick, 41 Misc. (N. Y.) 346; Willet v. Warren, 34 Wash. 647; Russner v. McMillan, 37 Wash. 416; McChesney v. DeBower, 106 Wisc. 315; Jones v. Bowman, 13 Wyo. 79, 67 L. R. A. 860.

46—As to the former discrimination against Roman Catholics in England, see Blake v. Leigh, Ambl. 306; Preston v. Ferrard, 4 Bro. P. C. 298. But now neither dissenters (Corbett v. Tottenham, 1 Ball. & B. 59), nor Roman Catholics (Re Byrnes, Ir. R. 7 C. L. 199), are disqualified to be appointed guardians.

And in the following cases the rule of respecting the child's inherited religious preference is applied: Re McGrath (1892) 2 Ch. 496, (1893) 1 Ch. 143; Re Nevin (1891) 2 Ch. 299; Re Clarke, 21 Ch. D. 817; Re Scanlon, 40 Ch. D. 200; Reg. v. Clarke, 7 El. & Bl. 202, 90 E. C. L. 202.

47—State v. Bird, 253 Mo. 569,

The appointment of a corporation as guardian is permitted, and is not uncommon in recent times, when the circumstances of the ward do not require personal supervision of his education and conduct, or the appointment is over the estate only.[48]

Formerly a married woman could not be appointed, and if appointed guardian of her own children, her trust ceased at remarriage; but since the modern enlargement of the legal status of married women, this discrimination has little recognition.[49]

The guardian should be within the summons and effective control of the court, and therefore non-residents of the

Ann. Cas. 1915 C 353 and note; Re Turner, 19 N. J. Eq. 433; Nicholson's Appeal, 20 Pa. St. 50; Jones v. Bowman, 13 Wyo. 79, 67 L. R. A. 860. But the preservation of the child's inherited religious faith will yield to the manifest interest of the child. Purinton v. Jamrock, 195 Mass. 187, 18 L. R. A. (N. S.) 926. And see the very full note, 41 L. R. A. (N. S.) 610.

48—Re Cordova, 4 Redf. (N. Y.) 66; Re Beebe, 58 Hun. (N. Y.) 604; Phalan v. Louisville Trust Company, 88 Ky. 275.

"In many of the states, particularly the older ones, this is fast becoming the favorite method of administering estates and executing trusts. The facts that such corporations have perpetuity of existence; that they are less liable than natural persons to sudden fluctuations of fortune; that, being organized for that especial purpose, they can administer estates more efficiently and economically, and that in case of large estates it is often difficult to find a natural person who is both able and willing to accept the trust and give the necessary bonds—have suggested the necessity and created the demand for such organizations." Minn. Loan & Trust Co. v. Beebe, 40 Minn. 7, 2 L. R. A. 418, 27 Am. & Eng. Corp. Cas. 386.

But the laws of Michigan do not provide for corporate guardianships. Re Rice, 42 Mich. 528.

49—**Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41;** Ex p. Maxwell, 12 Ind. 88; Farrer v. Clark, 29 Miss. 195; Byrom v. Gunn, 102 Ga. 565; Re O'Connell, 102 Iowa 355.

The older of these cases hold that the husband must assent to the wife's appointment. See Palmer v. Oakley. Ex p. Maxwell, Farrer v. Clark, *supra.*

In a few jurisdictions the disability of married women still continues. See King v. Seals, 45 Ala. 415; Campbell v. Scott, 3 Ind. T. 462.

jurisdiction will not be appointed except under special circumstances of necessity. But the court is the sole judge of this necessity; therefore the appointment of a non-resident is not void.[50]

When an orphan child acquires property, and guardianship is needed therefore both for the person and for the estate, considerations of economy and the avoidance of friction will usually lead to the appointment of the same person to both guardianships; but they are legally separate, and different persons may sometimes be appointed to the two trusts.[51]

§ 151. The ward's right to select his guardian. At common law, upon the termination of guardianship in socage, the ward had the right to appoint his own guardian. This power of the ward in socage does not exist in the United States, but in most if not all of the states statutes have been enacted under the provisions of which an infant who has reached the age of fourteen years, and requires a guardian, is entitled to choose his own guardian.

This right of choice is subject to control by the court to insure a suitable appointment, but the choice of the infant must prevail unless the court finds substantial causes for its disapproval.[52]

This right of choice does not extend to wards who have

50—Martin v. Tally, 72 Ala. 23; Re Johnson, 87 Iowa 130; Berry v. Johnson, 53 Me. 401.

51—Lawrence v. Thomas, 84 Iowa 362; Re Buckler, 96 App. Div. (N. Y.) 397. See *ante*, note 33.

The separation of the two guardianships has several times been condemned by the New Jersey courts; and they will not appoint the mother guardian of the person only, with a view to appointing a corporate guardian of the estate. Re Ross, 53 N. J. Eq. 344.

52—Adams's Appeal, 38 Conn. 304; White v. Strong, 75 Conn. 308; Dickerson v. Bowen, 128 Ga. 122; Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; State v. Reynolds, 121 Mo. Ap. 699.

53—Kelly v. Smith, 15 Ala. 687; Montgomery v. Smith, 3 Dana (Ky.) 599; Sessions v. Kell, 30 Miss. 458; Campbell v. English, Wright (Ohio) 119; Peary v. Brainard, 11 Ohio 442.

a natural guardian, or a testamentary guardian, or a guardian appointed in chancery.

Upon the question whether an infant having a guardian appointed by a statutory court can, upon reaching the age of fourteen years, choose a guardian who shall supersede the other, there is considerable conflict of authority. In some states it has been held that when the ward arrives at the age of fourteen years, the former guardian is *ipso facto* superseded, and a new guardian should be appointed on the nomination of the ward.[53] In other jurisdictions the ward at fourteen years has the right to have the former guardian removed, to permit him to exercise his choice,[54] while in quite a number of states the guardian appointed by the statutory court before the infant reached the age of fourteen years continues in office until the ward arrives at his majority, and the ward has no right to choose a new guardian to supersede him.[55]

§ 152. The necessity of qualification by giving bond. The giving of a probate bond is required to complete the judicial appointment of a guardian in most jurisdictions. The giving of the bond is a condition precedent to the existence of the guardian's authority, and acts done without such qualification are void.[56] But in some jurisdictions the

54—Dickerson v. Bowen, 128 Ga. 122; Young v. Lorain, 11 Ill. 624, 52 Am. Dec. 463; Lee's Appeal, 27 Pa. St. 229.

55—Mauro v. Ritchie, 3 Cranch (U. S. C. C.) 147, 16 Fed. Cas. 1171; Smoot v. Bell, 3 Cranch (U. S. C. C.) 343; May v. Webb, Kirby (Conn.) 287; Dibble v. Dibble, 8 Ind. 307; Re Nicoll, 1 Johns. Ch. (N. Y.) 25; Re Dyer, 5 Paige Ch. (N. Y.) 534; Re de Graffenried, Harp. Eq. (S. C.) 107; Ross v. Gill, 4 Call. (Va.) 250, 1 Wash. (Va.) 87; Ham v. Ham, 15 Gratt. (Va.) 74.

In North Carolina the removal of the former guardian in order to permit a new selection by the ward is a matter of discretion with the appointing court. Bray v. Brumsey, 1 Murphy (N. C.) 227.

56—**Hatch v. Ferguson, 15 C. C. A. 201, 33 L. R. A. 759;** Wadsworth v. Connell, 104 Ill. 369; Clarke v. Darnall, 8 Gill. & J. (Md.) 111; Wuesthoff v. Germania Ins. Co., 107 N. Y. 580; Carpenter v. Sloane, 20 Ohio 327.

giving of a bond is not essential to complete the guardian's appointment, and his acts are valid though no bond be given, the statutes requiring a bond being regarded as merely directory to the appointing court.[57]

The receipt of the formal letters of guardianship, taking the oath, and filing the inventory, are not essential prerequisites to the exercise of authority as a guardian.

§ 153. The termination of a guardianship. Guardianships, however constituted, terminate upon the death of the guardian, the death of the ward, or the arrival of the ward at full age.

At common law the marriage of a *feme sole* guardian terminated the guardianship *ipso facto,* and this rule was followed in some of the early American cases; but with the more extended status of married women in modern times the rule has ceased to be generally recognized.[58]

The marriage of a female ward to a man of full age terminates the guardianship, as the marital rights of the husband are inconsistent with the powers of a guardian; and guardianship of the person terminates by her marriage, though the husband be a minor.[59] But in those states where

57—Re Chin Me Ho, 140 Cal. 263; Cuyler v. Wayne, 64 Ga. 88, 37 Am. Rep. 53; Hunt v. Insley, 56 Kans. 213; Russell v. Coffin, 8 Pick. (Mass.) 143; Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; Carpenter v. Harris, 5 Mich. 323.

58—Carlisle v. Tuttle, 30 Ala. 613; Martin v. Foster, 38 Ala. 688; Leavel v. Bettis, 3 Bush (Ky.) 74; Cotton v. Wolf, 14 Bush (Ky.) 238; Wood v. Stafford, 50 Miss. 370.

In Georgia the mother's guardianship of the person as natural guardian does not abate by her re-marriage, but her guardianship of the estate does abate. Beard v. Dean, 64 Ga. 258; Hood v. Perry, 73 Ga. 322.

In England the right of a guardian to retain her office after her remarriage has long been recognized. Morgen v. Dillon, 9 Mod. 135.

59—Nicholson v. Wilborn, 13 Ga. 467; Haines v. Parrish, 1 Ind. Ap. 441; Bartlett v. Cowles, 15 Gray (Mass.) 445; Bickerstaff v. Marlin, 60 Miss. 509, 45 Am. Rep. 418; Fowler v. McLaughlin, 131 N. C. 209.

the husband has ceased to have the control and beneficial interest in his wife's property, it would seem that there is no reason why guardianship should not continue over the property of a minor wife, though married to an adult husband.

The marriage of a male ward terminates the guardianship over his person, but not over his estate.[60]

An appointment of a guardian is a nullity if he declines to act and does not enter upon the office. But a guardian who has accepted and entered upon the trust can not relieve himself of it by a mere resignation. He must properly account and be discharged before his responsibility as guardian ceases.[61]

Guardianship may be terminated by the removal of the guardian from his trust by a competent court.

The general power of chancery over the estates and interests of infants includes the power to remove any guardian for sufficient cause, whether he was appointed by chancery or by a statutory court. Some doubt once existed whether chancery had the power to remove testamentary guardians, but the power has long been firmly established.[62]

The probate and other courts to which by statute the jurisdiction over infants' estates has been committed have the power to remove the guardians by them appointed. Whether in any particular jurisdiction this statutory authority has superseded and ousted the power of chancery is a question depending on the local legislation and practice.

60—2 Kent's Com. 226.

61—**Wackerle v. People, 168 Ill. 250;** Longino v. Delta Bank, 75 Miss. 407.

62—Lord v. Hough, 37 Cal. 657; Re Klein, 95 Wisc. 246.

"The court of chancery may remove all guardians, whether appointed by itself, by the court of probate, by testament, or even by express act of the legislature, whenever it is satisfied that the guardian is abusing his trust, or the interests of the ward require it." Cowls v. Cowls, 8 Ill. 435, 44 Am. Dec. 708.

In the absence of statutory provisions to the contrary, the proceedings to remove a guardian are usually instituted by petition to the probate court or bill filed in chancery. The application should be made by the next friend of the ward, or by some relative or interested person. The guardian is entitled to notice and a hearing.[63] But notice to an infant ward is not necessary, unless some special reason exists therefor. The final determination of the trial court may be reviewed at the instance of a person aggrieved, but where the determination below is based on facts supported by legal evidence, or where there has been an exercise of discretion which has not been abused, the reviewing court will not interfere.[64]

Guardians can be removed only for some definite cause; a finding that the interest of the ward would be promoted by a change is not sufficient.[65]

It is essential that the guardian should be under the effective control of the supervising court; removal of residence from the jurisdiction and reach of process of the court is therefore sufficient ground for removal from the guardianship.[66]

63—Speight v. Knight, 11 Ala. 461; Wackerle v. People, 168 Ill. 250; Colvin v. State, 127 Ind. 403; Phillips v. Williams, 118 Ky. 757; McCloskey v. Plantz, 76 Minn. 323; Copp v. Copp, 20 N. H. 284.

64—Johnson v. Metzger, 95 Ind. 307; Bernhamer v. Miller, 114 Ind. 501; King v. King, 73 Mo. Ap. 78; Snavely v. Harkrader, 29 Gratt. (Va.) 112.

But see MacGill v. McEvey, 85 Md. 286.

65—Lord v. Hough, 37 Cal. 657, 664.

But that "the conduct of the guardian was such as to render him an unsuitable person" has been held to be a sufficient finding to support a removal, the recital of particular acts of misconduct not being essential. Gray v. Parke, 155 Mass. 433.

Corruption or malfeasance is not necessary to removal; but the power extends to "every case where the guardian for any reason is shown not to be capable of or not in situation to suitably protect his ward's interest." Crooker v. Smith, 47 Neb. 102.

66—Speight v. Knight, 11 Ala. 461; Cockrell v. Cockrell, 36 Ala. 673; Farrington v. Secor, 91 Iowa

If the guardian, after appointment, shows himself to be unfit for the trust, he may be removed. This unfitness need not necessarily have arisen since the appointment. Unfitness justifying removal may consist of immorality of character, intemperance, ignorance so great as to prevent a performance of the trust, insanity or other incapacitating illness, insolvency or such poverty as will render him unable properly to care for the ward's interests, or any hostility of interests between the guardian and ward.[67] The marriage of a female guardian has been held in some cases to be good cause for removal, but this rule is probably obsolete now.

Actual misconduct in the performance of the trust will demonstrate the guardian's unfitness, and constitute an independent ground for removal. Thus any neglect of or injury to the ward's interest, neglecting to file an inventory or to keep and file accounts, or neglecting to obey the orders of the court will justify removal.

Any effort to interfere with or change the ward's inherited religious belief will be checked and punished by removal of the guardian.[68]

706; Finney v. State, 9 Mo. 227; Cooke v. Beale, 11 Ired. L. (N. C.) 36.

In Louisiana, the permanent removal of the guardian from the state *ipso facto* terminates the guardianship. Re Cass, 212 La. An. 361.

67—Kettletass v. Gardner, 1 Paige Ch. (N. Y.) 488 (intemperance); Ruohs v. Backer, 6 Heisk (Tenn.) 395, 19 Am. Rep. 598 (immorality of life tending to corrupt or contaminate the ward); Re Padgett, 114 Mo. Ap. 307; Ury v. Brown, 129 N. C. 270; Ex p. Crutchfield, 3 Yerg. (Tenn.) 336 (mismanagement of funds); Re Mansfield's estate, 206 Pa. St. 64 (hostility of feeling); Windsor v. McAtee, 2 Metc. (Ky.) 430; Robertson v. Epperson, 78 Neb. 279 (hostility of interest); Nicholson's Appeal, 20 Pa. St. 50 (ignorant mismanagement).

"It matters little to an orphan child whether his interests are sacrificed and his prospects blighted by well-meaning ignorance or by wilful malice. Either is within the definition of misconduct, a word which applies not to the motive, but to the act."

Nicholson's Appeal, 20 Pa. St. 50; Crooker v. Smith, 47 Neb. 102.

68—Re McCannon, 60 Misc. (N. Y.) 22.

"The law which forbids the appointment of a guardian whose religious faith differs from that of the parents should be most strictly obeyed whenever it is practicable for reasons so many and so obvious that they need not be repeated. But it is no cause for discharging one from a trust with which he is already clothed. A guardian can only be removed for mismanagement or misconduct, and certainly a man's religious opinions are neither the one nor the other. But if he should attempt by any harsh or unfair means to erase the impressions made by the parents on the mind of the child, and much more if he should put its conscience to any kind of torture, the law would not only justify but demand his removal." Nicholson's Appeal, 20 Pa. St. 50.

And see, *ante*, note 47.

CHAPTER XX

THE POWERS AND OBLIGATIONS OF GUARDIANS.

§ 154. The powers of guardians. *1. Over the person of the ward.* A guardian appointed without limitation over an orphan child is guardian of both his person and his estate. But when the father is living, the appointment will be construed to be only over the estate, unless the father has been found to be unfit to have the child's custody.[1]

When the guardianship extends to the person, the guardian has a legal right to the custody and control of the ward superior to that of any other person. He can enforce this right by habeas corpus, or by action of trespass for taking away the ward.[2]

This legal right, however, is subordinate to the welfare of the ward, and will be disregarded by the court whenever necessary in the ward's interest.[3]

§ 155. *2. Over the ward's estate.* The guardian has the general control and management of the ward's property.[4]

1—**Brooke v. Logan, 112 Ind. 183, 2 Am. St. Rep. 177.**

2—Grimes v. Butsch, 142 Ind. 113; Cottrell v. Boothe, 166 Ind. 469; Macready v. Wilcox, 33 Conn. 328; Jenkins v. Clark, 71 Iowa 522; Townsend v. Kendall, 4 Minn. 412, 77 Am. Dec. 534; Keith v. Miles, 39 Miss. 442, 77 Am. Dec. 685; Wood v. Yale, 10 N. H. 247, 34 Am. Dec. 150.

Grimes v. Butsch and Townsend v. Kendall, *supra*, are both cases in which the court enforced the authority of a guardian in another state over a child in the state of the forum.

3—Kelsey v. Green, 69 Conn. 291, 31 L. R. A. 471; Bryan v. Lyon, 104 Ind. 227, 54 Am. Rep. 309; People v. Walts, 122 N. Y. 238.

Compare *ante*, note 14 to § 146.

4—DeGreayer v. Superior Court, 117 Cal. 640, 59 Am. St. Rep. 220.

It is held in Connecticut, Maine,

He is therefore entitled to possession of the ward's real and personal estate, and his possession is regarded as the possession of the ward.[5]

This duty of possession and control implies and includes the power of investing the ward's funds, subject to all the regulations imposed by statute upon the investment of trust funds, and to the duty of due diligence and caution in selecting investments.[6]

The guardian has also the right to clear off, with any

Massachusetts, Mississippi, Missouri and New Hampshire, that the guardian has a naked power not coupled with an interest. Welles v. Cowles, 4 Conn. 189, 10 Am. Dec. 115; Hutchins v. Dresser, 26 Me. 76; Manson v. Felton, 13 Pick. (Mass.) 206; Hicks v. Chapman, 10 Allen (Mass.) 463; Simmons v. Almy, 100 Mass. 239; Rollins v. Marsh, 128 Mass. 116; Grist v. Forehand, 36 Miss. 69; Judson v. Walker, 155 Mo. 166, 179; Newton v. Nutt, 58 N. H. 599.

But in California, New Jersey, New York, Pennsylvania, Vermont and Virginia, it is held that he has not only an authority, but also a vested legal interest in the property of the ward. Lincoln v. Alexander, 52 Cal. 482, 28 Am. Rep. 639; Van Doren v. Everitt, 5 N. J. L. 528; People v. Byron, 3 Johns. Cas. (N. Y.) 53; Fernsler v. Moyer, 3 Watts. & S. (Pa.) 416, 39 Am. Dec. 33; Pepper v. Stone, 10 Vt. 427; Truss v. Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748.

But this difference of legal theory makes little practical difference as to the extent of the guardian's power.

A guardian can not be garnisheed for the ward's debts, since that would deprive him of the control of the ward's property and the right to pay his debts. Homestead v. Lomis, 53 Me. 549.

5—**Truss v. Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748;** Re Hynes, 105 N. Y. 560; Williams v. Walton, 8 Yerg. (Tenn.) 387, 29 Am. Dec. 122.

Consequently such suits as are based on a possessory right are commonly brought in the name of the guardian himself, rather than in that of the infant by next friend. Boruff v. Stipp, 126 Ind. 32; Kinsley v. Kinsley, 150 Ind. 67; Beecher v. Crouse, 19 Wend. (N. Y.) 306; Re Hynes, 105 N. Y. 560; Truss v. Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748.

And the ward can trace title by possession through possession by his guardian. Williams v. Walton, 8 Yerg. (Tenn.) 387, 29 Am. Dec. 122.

6—Stevens v. Meserve, 73 N. H. 293, 111 Am. St. Rep. 612; Abrams v. U. S. F. & G. Co., 127 Wisc. 579, 115 Am. St. Rep. 1055, 5 L. R. A. (N. S.) 575.

available funds, incumbrances resting upon the ward's property.[7]

The guardian has power to collect and reduce to possession the ward's choses in action, and to discharge them on settlement.[8]

The guardian has the power to sell the ward's personal property without an order of court, except where the statute prohibits such sale.[9]

§ 156. Sale of the ward's real estate. A guardian has no inherent power to sell real estate, and as a general rule can make such a sale only by virtue of some special grant of

7—Cheney v. Roodhouse, 135 Ill. 257.

8—Maclay v. Equitable Society, 152 U. S. 499; Chapman v. Tibbetts, 33 N. Y. 289; Torry v. Black, 58 N. Y. 185; Hunter v. Lawrence, 11 Gratt. (Va.) 111, 62 Am. Dec. 640.

The recovery of possession by the guardian constitutes reduction to possession of a ward's choses in action, so that the common-law marital rights of the ward's husband attach thereto.

Magee v. Toland, 8 Port (Ala.) 36; Chambers v. Perry, 17 Ala. 726; Sallee v. Arnold, 32 Mo. 532, 82 Am. Dec. 144; Davis v. Rhame, 1 McCord Eq. (S. C.) 191.

And the husband's guardian may reduce to possession the wife's choses in action, and thereby obtain title thereto in the right of the husband. Ware v. Ware, 28 Gratt. (Va.) 670.

As to the mode of suit to enforce the rights of an infant, see *ante*, § 19.

9—**Echols v. Speake, 185 Ala. 149, Ann. Cas. 1916 C 332 and note;** Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; Hunter v. Lawrence, 11 Gratt. (Va.) 111, 62 Am. Dec. 640; Schmidt v. Shaver, 196 Ill. 108, 89 Am. St. Rep. 250. *Contra* in South Carolina, McDuffie v. McIntyre, 11 S. C. 551, 32 Am. Rep. 500; and in California, Morse v. Hinkley, 124 Cal. 154.

Even if there is a statute authorizing courts of probate to order the sale of personal property, the power of the guardian to sell without an order is not taken away; the statute merely gives him the right to obtain judicial approval of his act by an order of court. Maclay v. Equitable Society, 152 U. S. 499, 504; Wallace v. Holmes, 9 Blatchf. (U. S. C. C.) 65; Gardner v. Beacon Trust Company, 190 Mass. 72, 2 L. R. A. (N. S.) 767, 112 Am. St. Rep. 303. *Contra*, Hendrix v. Richards, 57 Neb. 794.

A guardian is always bound to obey the orders of court, and if he sells in violation of an order the sale is void, though he had power to sell without an order. Cox v. Manvell, 56 Minn. 358.

power. A deed made without such authority is void.[10]

A contract by a guardian to sell the ward's real estate, made in advance of any legal authority, is contrary to public policy and void.[11]

In some jurisdictions it has been held that the power to order a sale of a minor's real estate exists only by virtue of a statute, and that the inherent power of chancery over the estates of infants does not extend to ordering sales of their real estate on general considerations of advantage to them; but the cases are not uniform as to this limitation of the power of chancery.[12]

The power to order a sale is usually vested in the probate

10—**Johns v. Tiers, 114 Pa. St. 611;** Wells v. Chaffin, 60 Ga. 677; Young v. Keogh, 11 Ill. 642; Cooter v. Dearborn, 115 Ill. 509; Dellinger v. Foltz, 93 Va. 729.

In Johns v. Tiers, *supra*, an agreement of sale was carried out by the guardian permitting the land to be sold for taxes and the buyer to bid it in, afterward paying him the balance of the agreed price, thus making a valid paper title; but this subterfuge was held unavailing.

If the ward himself makes a deed of his land, it can not be validated by an act of the guardian, except by a sale regularly made on an order of court. Doty v. Hubbard, 55 Vt. 278; Funk v. Rentchler, 134 Ind. 68.

And the consent of the ward, or his subsequent ratification, gives no validity to an unauthorized sale by the guardian. Antonides v. Walling, 4 N. J. Eq. 42, 31 Am. Dec. 248; Dellinger v. Foltz, 93 Va. 729. But see *post*, note 21.

11—Wolf v. Holton, 104 Mich. 107; Gault Lumber Co. v. Pyles, 19 Okla. 455; Leroy v. Jacobosky, 136 N. C. 443, 67 L. R. A. 977.

But it was held in Morris v. Goodwin, 1 Ind. Ap. 481, that although a contract to sell the ward's land for an agreed price is not enforceable, yet if the guardian at once applied for and received a proper order, and is ready and able to carry out the contract, the purchaser can not repudiate the contract and recover back an advance payment.

12—The power of chancery to order the sale of a ward's real estate is denied in Re Infant, 1 Malloy 528; Calvert v. Godfrey, 6 Beav. 97; Rogers v. Dill, 6 Hill (N. Y.) 415; Faulkner v. Davis, 18 Gratt. (Va.) 651, 98 Am. Dec. 698. The power is affirmed in Goodman v. Winter, 64 Ala. 410, 434, 38 Am. Rep. 13; Dodge v. Cole, 97 Ill. 338, 37 Am. Rep. 111; Thompson v. Mebane, 4 Heisk (Tenn.) 370.

court having general power over the guardianship; or if the guardianship be foreign, in the probate court having jurisdiction over the situs of the land.

The statutes also fix the grounds on which a sale may be ordered. These are ordinarily to raise funds for the maintenance of the ward, or for the necessary expenses of the estate; in some jurisdictions the better investment of the funds, or the general interest of the ward as determined by the court, is made a statutory ground for a sale; but the power of the court is always strictly limited to the grounds fixed by the statute.

The power of sale of the ward's real estate (unless limited by statute) extends to future and even to contingent interests. But great caution will be exercised in ordering a sale of such estates, in order that the ward's interests may not be sacrificed.[13] And the interest of unborn heirs can not be divested by such a sale except by express legislative authority.[14]

The guardian's deed conveys only the actual title of the ward; and the rule *"caveat emptor"* applies as to any defect of title, or shortage in the quantity of the land. But in some cases of misrepresentation or gross mistake relief has been given by annulling the sale, or giving a credit on the purchase price.[15]

13—Nunn v. Hancock, L. R. 6 Ch. 850; Jenkins v. Fahey, 73 N. Y. 355; Re Dodge, 105 N. Y. 585; Goodman v. Winter, 64 Ala. 410, 435, 38 Am. Rep. 13; Hovey v. Nellis, 98 Mich. 374.

And a homestead interest, though exempt from sale for debts, may be sold by guardian's sale for the ward's benefit. Morrell v. Harris, 65 Ark. 355, 67 Am. St. Rep. 929, 41 L. R. A. 714; Re Hamilton, 120 Cal. 421.

But a sale can not pass the ward's mere expectancy of hereafter inheriting an additional interest from his mother, now living, although the order and sale expressly include the future interest. Erwin v. Garner, 108 Ind. 488.

14—Baker v. Lorillard, 4 N. Y. 257; Massie v. Hiatt, 82 Ky. 314; Downin v. Sprecher, 35 Md. 474; Garland v. Loving, 1 Rand. (Va.) 396.

15—Stonebrook v. Wisner, 171 Iowa 109, L. R. A. 1915 E 834

To make a sale which will confer title on the purchaser and divest the ward's title, the provisions of the statute must be substantially complied with. Under most of the statutes there must be a lawful guardian, a petition filling substantially at least the requirements of the law, a proper sale bond given by the guardian, an oath administered to him, an order of the court for the sale of the land, a sale in compliance therewith and in substantial conformity to the requirements of the statute, a report of the sale to and confirmation by the court, and an actual conveyance by deed.[16]

Notice to the ward of the petition for a sale is not usually required, since the proceeding is not adversary to his rights, and the guardian represents him; but notice must be given to whatever persons in interest are made parties by the statute.

It is the theory of the law that the court makes the sale, and that the guardian acts only as the agent or arm of the court. It is the final confirmation of the deed by the court that gives effect to the conveyance, rather than the execution by the guardian.[17]

The usual and proper process is for the guardian, having effected a sale, to draft his deed, and then report the sale to the court and obtain a specific order to execute the deed as drafted. This careful process is almost universally followed in the higher courts, but the process is sometimes more informal in probate courts. The order of sale, and the approval of the return of sale, should however never be omitted.

and note. See *post*, note 30.

16—Tracy v. Roberts, 88 Me. 310, 51 Am. St. Rep. 394; Williams v. Reed, 5 Pick. (Mass.) 480; Mettingly v. Read, 3 Metc. (Ky.) 524, 79 Am. Dec. 655; Frazier v. Steenrod, 7 Iowa 339, 71 Am. Dec. 447.

17—Young v. Keogh, 11 Ill. 542; Penn. v. Heisey, 19 Ill. 295, 68 Am. Dec. 597; Titman v. Riker, 43 N. J. Eq. 122; Battell v. Torrey, 65 N. Y. 294.

§ 157. The effect of irregularities in the sale. As the sale of a ward's land by probate order takes from the infant his property without his consent, and depends for its validity on the terms of positive law, the law must be substantially complied with in every material particular. If a court not having jurisdiction over the real estate in question should order a sale, this action would be void, and the title of the ward would not be affected by the deed.[18]

And even if the court had jurisdiction, every substantial requirement of the law must be fulfilled, or the ward can, on arriving at his majority, avoid the sale and reclaim his land.[19]

18—Tracy v. Roberts, 88 Me. 310, 51 Am. St. Rep. 394; Ball v. Love, 78 Ga. 125.

In Frazier v. Steenrod, 7 Iowa 339, 71 Am. Dec. 447, it was held that where the notice required to be published described the land wrongly, locating it in the wrong township, the defect was jurisdictional and the sale void. And in Cooper v. Sunderland, 3 Iowa 14, 66 Am. Dec. 52, the same effect was given to the failure of the guardian to take the required oath. The correctness of the latter decision may well be doubted.

In Re Livermore, 132 Cal. 99, 84 Am. St. Rep. 37, it was held that the court was without jurisdiction where the ward died before the proceedings for a sale were begun.

19—"The burden of proof to show that he has acquired the infant's title rests upon the defendant, and he must establish the fact by affirmative evidence that every requirement of the statute necessary to confer jurisdiction upon the court to order a sale of the infant's property has been complied with. In the absence of proof thereof, there are no presumptions in such proceedings that material requirements of the statute have been performed by the special tribunal having authority to act in the case. Its jurisdiction is made conditional, and the circumstances upon which it depends must be made to appear by proof." Ellwood v. Northrop, 106 N. Y. 172.

Leuders v. Thomas, 35 Fla. 518, 48 Am. St. Rep. 255; Frazier v. Jeakins, 64 Kan. 615, 57 L. R. A. 575; Mantoni v. Purdy, 11 Minn. 384, 88 Am. Dec. 88; Bachelor v. Korb, 58 Neb. 122, 76 Am. St. Rep. 70; Warren v. Union Bank, 167 N. Y. 259, 68 Am. St. Rep. 777, 43 L. R. A. 256; Weld v. Johnson Mfg. Co., 84 Wisc. 537.

See, as to the effect of a failure to give the sale bond, the note, Ann. Cas. 1913 D 190; also Richelson v. Mariette, 34 S. D. 573, Ann. Cas. 1917 A 883.

The rule *caveat emptor* applies so far as to require the purchaser to see to it that the record of the court shows the fulfillment of every condition prescribed by the law. He is not, however, bound to examine into irregularities not appearing of record, nor is he responsible, or his title affected, by any subsequent misuse of the proceeds of the sale by the guardian, unless he is a party to such irregularities or to such misuse of the money, or had knowledge of them before paying his money.[20]

Even if the sale should be so defective as to be subject to avoidance by the ward, he may, after coming of age, ratify and confirm it, so as to perfect the title of the buyer. And if the buyer made the purchase and has paid the price in good faith, and the ward after coming of age has received the benefit of the purchase, he is estopped to avoid the sale.[21]

The purchaser also, if he discovers any irregularities in the proceeding for the sale, is entitled to refuse to complete the purchase, as he can not justly be required to pay for a doubtful title.[22]

But as against a mere collateral attack, that is, in any other proceeding than a direct one to avoid the sale, the deed will be treated as valid if the sale was ordered and confirmed by the court having jurisdiction.[23]

20—Fitzgibbon v. Lake, 29 Ill. 165, 81 Am. Dec. 302.

21—Tracy v. Roberts, 88 Me. 310, 51 Am. St. Rep. 394; Hobbs v. Nashville R. Co., 122 Ala. 602, 82 Am. St. Rep. 103; Penn v. Heisey, 19 Ill. 295, 68 Am. Dec. 597; Deford v. Mercer, 24 Iowa 118, 92 Am. Dec. 460; Boyer v. East, 161 N. Y. 580, 76 Am. St. Rep. 290.

Contra, Dellinger v. Foltz, 93 Va. 729.

22—Morris v. Goodwin, 1 Ind. Ap. 481; Mattingly v. Read, 3 Metc. (Ky.) 524, 79 Am. Dec. 565; Hubacheck v. Maxbass Security Bank, 117 Minn. 163, Ann. Cas. 1913 D 187.

23—Arrowsmith v. Gleason, 129 U. S. 86, following Arrowsmith v. Harmening, 42 Ohio St. 254; Daughtry v. Thweatt, 105 Ala. 615, 53 Am. St. Rep. 146; Scarf v. Aldrich, 97 Cal. 360, 33 Am. St. Rep. 190; Young v. Lorain, 11 Ill. 624, Am. Dec. 463; Field v. Peeples, 180 Ill. 376; Walker v. Hill,

If a guardian himself buys the property at his guardian's sale, whether directly or indirectly, the purchase is voidable, and the ward may hold him as a trustee of the land, even if the purchase was made without actual fraudulent intent.[24]

§ 158. A guardian's power to mortgage, lease or purchase real estate. The guardian has no inherent power to make a mortgage of the ward's real estate. But in many jurisdictions power to do so is conferred upon him by statute, upon his obtaining an order from the proper court. When the authority is so conferred the statute must be strictly followed. As to the incidents of this power, the decisions generally follow those on the power to sell land.[25]

111 Ind. 223, 235, 393; Eliason v. Bronnenburg, 147 Ind. 248; Pursley v. Hayes, 22 Iowa 11, 92 Am. Dec. 350; Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; Cox v. Boyce, 152 Mo. 576, 75 Am. St. Rep. 483; Hughes v. Goodale, 26 Mont. 93, 91 Am. St. Rep. 401; Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627; Williams v. Harrington, 11 Ired. L. (N. C.) 616, 53 Am. Dec. 421; Morrison v. Nellis, 115 Pa. St. 41; Taffinder v. Merrell, 95 Tex. 95, 93 Am. St. Rep. 814.

On the other hand, the New York court of appeals said in a recent case: "If it be said that the court before which this proceeding was taken was a court of general jurisdiction, still, as the proceeding does not fall within the ordinary proceedings of a court of common law, its jurisdiction is yet special and limited, wholly dependent upon the statute; and no presumption can be indulged in favoring that particular jurisdiction. In that class of cases the statute must be strictly pursued, whatever jurisdiction the court may possess." Warren v. Union Bank, 157 N. Y. 259, 68 Am. St. Rep. 777, 43 L. R. A. 256.

24—**Re Tanner's estate, 218 Pa. St. 361;** Frazier v. Jeakins, 64 Kan. 615, 57 L. R. A. 575; Walker v. Walker, 101 Mass. 169; Davone v. Fanning, 2 Johns. Ch. (N. Y.) 252; Horton v. Maine, 22 R. I. 126; Winter v. Truax, 87 Mich. 324, 24 Am. St. Rep. 160; Burns v. Cooper, 72 C. C. A. 25.

It was said in Elrod v. Lancaster, 2 Head (Tenn.) 571, that "the guardian may purchase; although his conduct will be watched with jealousy, yet if it be manifest that he acted fairly, with the utmost good faith," and without any intent to gain any benefit for himself at the ward's expense, the purchase will be held valid; but this statement is hardly reconcilable with the general current of decision as shown in the foregoing citations.

25—U. S. Mortgage Co. v. Sper-

The guardian's general power of control over the ward's property, and his duty to produce an income from it, involve the right to make leases for a period not extending beyond his term of office; but if the guardianship terminates, either by expiration of the term or for other causes, the lease becomes revocable by the ward or the succeeding guardian, as the case may be.[26]

While it has been held in England that the guardian may buy real estate with the ward's funds, if it is manifestly for his advantage, and so change the ward's estate from personal to real, the American courts have commonly held that the guardian has no such power, unless the purchase be ordered by the court under statutory authority. If he makes such a purchase, the ward has the election at his majority to hold the land, or to repudiate the purchase and demand the money.[27]

§ 159. The guardian's contracts and covenants. The prevailing doctrine is that a guardian has no power to make a contract binding upon the ward or upon his estate,

ry, 138 U. S. 313; Battell v. Torrey, 65 N. Y. 294; Warren v. Union Bank, 157 N. Y. 259, 68 Am. St. Rep. 777, 43 L. R. A. 256; Davidson v. Wampler, 29 Mont. 61; Trutch v. Bunnell, 11 Ore. 58, 50 Am. Rep. 456.

As to a pledge by a guardian of the ward's bank stock to secure a loan, see Re Hynd's estate, 183 Pa. St. 260.

26—2 Kent's Com. 228; Emerson v. Spicer, 46 N. Y. 594; Jackson v. O'Rourke, 71 Neb. 418.

And a lease given by a guardian in socage, whose office expires when the infant reaches fourteen, terminates at that time. Snook v. Sutton, 10 N. J. L. 133; Emerson v. Spicer, 46 N. Y. 594.

But an "oil lease" amounts to a sale of the substance of the real estate, and can not be made without an order of court. Re Stoughton, 88 Pa. St. 198; Wilson v. Youst, 43 W. Va. 826, 39 L. R. A. 292.

It has recently been held that a statute empowering guardians to make mine leases extending beyond the ward's minority is unconstitutional. Tierney Coal Company v. Kash, 108 Ky. 815, 4 A. L. R. 1540 and note.

27—**Boisseau v. Boisseau, 79 Va. 73, 52 Am. Rep. 616**; Re Bolton, 159 N. Y. 129, affirming 20

however proper and beneficial the contract may be; but that contracts made by him impose a personal liability upon himself, and his protection from loss lies in his right to charge the expenditures to the ward's estate in his account.[28] This may seem at first thought a strange and unjustifiable rule; but the argument by which it is supported is entirely sound. The other party to the contract can not be expected to know anything about the condition of the ward's estate, and he may fairly claim to hold liable the man with whom he has dealt; while it is the guardian's business to know the condition of his ward's estate, and whether it will bear the particular expenditure; if the estate is able to meet the debt, the guardian is protected by charging the expenditure in his account; and if it should turn out to be insufficient, the guardian should bear the loss rather than the outside party who trusted to his contract.

The only case of injustice would be where the ward's estate was ample, but collection can not be made from the guardian himself. To overcome that possible hardship, it has been held or provided by statute in some jurisdictions that a contract properly made by the guardian in the fulfillment of his office imposes direct liability upon the ward's estate.[29]

In harmony with the general rule as to contracts, the covenants contained in a guardian's deed bind the guardian only, and not the ward's estate.[30] An after-acquired title

Misc. (N. Y.) 532; Scheib v. Thompson, 23 Utah 564.

28—**Lathrop v. Duffield, 134 Mich. 485;** Fish v. McCarthy, 96 Cal. 484, 31 Am. St. Rep. 237; McKee v. Hunt, 142 Cal. 526; Howard v. Cassels, 105 Ga. 416, 70 Am. St. Rep. 44; Nichols v. Sargent, 125 Ill. 309, 8 Am. St. Rep. 378; Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87; Wallis v. Bardwell, 126 Mass. 366; Ide v. Brown, 178 N. Y. 26; Fessenden v. Jones, 7 Jones L. (N. C.) 14, 75 Am. Dec. 445; Shepard v. Hanson, 9 N. D. 249; Andrus v. Blazzard, 23 Utah 233, 54 L. R. A. 354.

29—McCoy v. Lane, 66 Neb. 847; Price's Appeal, 117 Pa. St. 410.

30—Chestnut v. Tyson, 105 Ala. 149, 53 Am. St. Rep. 101; Young v. Lorain, 11 Ill, 624, 52 Am. Dec.

of the ward will not, therefore, be divested by the deed. The usual form of covenant in a guardian's deed, as in those of executors, administrators and trustees, is simply that the guardian has good power to sell, and that he will defend the title conveyed against any other title emanating from him. There is no implied covenant as to the ward's title.

§ 160. Release, waiver or compromise of the ward's claims. A guardian has no power to relinquish, abandon or release, without consideration, any right or interest of the ward, nor to bind him by admissions contrary to his interest; nor can the ward be divested of such rights by waiver of the guardian, or by estoppel resting on his acts or omissions.[31] But where the ward has an election between

463; Webster v. Conley, 46 Ill. 13, 92 Am. Dec. 234; Whiting v. Dewey, 15 Pick. (Mass.) 428.

If a guardian makes a contract to sell land without legal authority, and covenants to make a good and sufficient deed, he is personally liable on the covenant. Mason v. Caldwell, 10 Ill. 196, 48 Am. Dec. 330.

Where a guardian by mistake included in his deed land not belonging to the ward, he is personally liable on the covenants of title. Holyoke v. Clark, 54 N. H. 578.

A covenant of good right to sell estops the guardian from afterward setting up his own prior title. Heard v. Hall, 16 Pick. (Mass.) 457.

31—Smith v. Dibbell, 31 Tex. 239, 98 Am. Dec. 526; Swarthout v. Curtis, 5 N. Y. 302, 55 Am. Dec. 345.

A guardian can not bind the ward by a confession of judgment, Metcalfe v. Alter, 31 La. Ann. 389; or by a consent decree, Braswell v. Downs, 11 Fla. 62; Bearinger v. Pelton, 78 Mich. 109.

A guardian can not make a stipulation admitting in evidence facts occurring since the pendency of the suit, and not legally admissible. Wood v. Truax, 39 Mich. 628.

A guardian can not waive the bar of the statute of limitations which has already run. Clement v. Sigur, 29 La. Ann. 798. Nor can he waive notice to a ward of proceedings in the settlement of an estate. Wade v. Bridgewell, 38 Miss. 420.

A guardian can not consent to executors making partition of an ancestor's estate without order of court or power under the will. Jones v. Massey, 9 S. Car. 376.

Where an order has been made in chancery for the payment of money into court for the ward, the guardian can not accept a deed of land in lieu thereof. Westbrook v. Comstock, Walk. (Mich.) 314.

alternative rights or remedies, the guardian can exercise the necessary election on his behalf.[32]

But the right of a widow to elect between her dower and a testamentary provision in lieu thereof[33] is personal to herself and the election can not be made for an insane widow by her conservator or guardian.[34] But the court having jurisdiction over her affairs may make such election for her, or validate the guardian's election by its approval.[35]

And where the ward has claims which are a matter of fair dispute, the guardian has authority to submit them to arbitration, or to make a reasonable *bona fide* compromise.[36]

§161. The guardian's power in another state. A guardian appointed by the courts of one state has no authority over the ward's person or property in another state, except such as is allowed by the comity of that state as expressed through its legislation or by its courts. This necessarily follows from the fact that the guardian's authority rests

A minor can not be estopped by the silence of his guardian while one is encroaching upon his rights. Shamleffer v. Council Grove Peerless Mill Co., 18 Kan. 32.

A guardian can not defeat the title of the ward to lands improperly sold by the administrator for division, by his receipt of a share of the price. Whitehead v. Jones, 56 Ala. 152.

But declarations by the guardian at the time he acquired property may be admissible against the ward as a part of the *res gestae*. Tenney v. Evans, 14 N. H. 343, 40 Am. Dec. 194.

32—Maclay v. Equitable Soc., 152 U. S. 499.

"The power of guardians to make an election on behalf of their wards has been pretty liberally construed in Massachusetts, when otherwise the wards would lose important rights." Warfield v. Fisk, 136 Mass. 220.

33—See *ante*, § 107.

34—**Clark v. Boston Safe Deposit Co., 116 Me. 450, L. R. A. 1918 B 884;** Kennedy v. Johnston, 65 Pa. St. 451, 3 Am. Rep. 650.

35—Hardy v. Richards, 98 Miss. 625, 35 L. R. A. (N. S.) 1210 and note; Re Connor, 254 Mo. 65, 49 L. R. A. (N. S.) 1108.

36—**Maclay v. Equitable Soc., 152 U. S. 499;** Torrey v. Black 58 N. Y. 185; Malprass v. Graves, 111 Ga. 743.

By the Illinois and Kentucky statutes requiring any compro-

on the force of positive law, which can have no effect beyond the territory of the law-making power.

But the tendency of modern statutes and decisions is to defer to the law of the domicil, and to support the authority of the guardian appointed there. In the exercise of such comity the authority of a foreign guardian over the person of his ward will often be enforced, and funds in the hands of a local guardian, not of the domicil, are often ordered to be transmitted to the guardian of the domicil, or the local guardian having funds is ordered to pay over to the guardian of the domicil sums necessary for the ward's support. But the exercise of such comity is discretionary, and will be refused unless it will evidently serve the best interest of all parties.[37]

If a debtor of an infant living in another state voluntarily recognizes the authority of the guardian of the domicil, and pays the debt to him without suit, he will be protected in so doing, unless some adverse lien or claim had attached to it in the state of the forum.[38]

The absence of legal power in another jurisdiction will not excuse a guardian for abandoning or neglecting rights of the ward in that jurisdiction. He should take the proper

mise of the ward's rights to be approved by the court "a change or modification of the common law was intended." Hayes v. Mass. Life Ins. Co., 125 Ill. 626, 1 L. R. A. 303; Bunnell v. Bunnell, 111 Ky. 566.

37—**Woodworth v. Spring, 4 Allen (Mass.) 321;** Hoyt v. Sprague, 103 U. S. 613; Morgan v. Potter, 157 U. S. 195; Grimmett v. Witherington, 16 Ark. 377, 63 Am. Dec. 66; Earl v. Dresser, 30 Ind. 11, 95 Am. Dec. 660; Grimes v. Butsch, 142 Ind. 113; Re Benton, 92 Iowa 202, 54 Am. St. Rep. 546; Re Rice, 42 Mich. 528; Townsend v. Kendall, 4 Minn. 412, 77 Am. Dec. 534; Hanrahan v. Sears, 72 N. H. 71; Banning v. Gotshall, 62 Ohio St. 210; Mitchell v. People's Savings Bank, 20 R. I. 500.

38—Parson v. Lyman, 20 N. Y. 103 (which applies specifically to executors and administrators, but was cited as establishing the law as to guardians in Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580); Ferneau v. Whitford, 39 Mo. Ap. 311.

But the defendant cannot "justify a payment to a guardian ap-

steps to secure the ward's rights by appeal to the comity of the foreign state, or, if necessary, by procuring ancillary guardianship therein.[39]

§ 162. The obligation of the guardian to his ward. The guardian is required to exercise that degree of diligence and care in the performance of his duties that a prudent business man would exercise under like circumstances in his own affairs. Such a degree of strictness is not to be used in measuring his conduct as would deter responsible men from accepting such a trust.[40] He is bound to manage the estate himself, and has no right to divest himself of its supervision and control.[41]

In the investment of the ward's funds the standard of the conduct of the prudent man in his own affairs is hardly high enough. Even a prudent man may sometimes make an investment having a speculative element for the sake of a high rate of interest or in the hope of an unusual profit; and a prudent man may often incur some risk to help his friends.

But in dealing with trust funds, particularly with those of infants, the element of speculation and the element of favoritism must both be entirely eliminated.[42]

pointed under a foreign jurisdiction, who by the laws of the sovereignty appointing him was not authorized to receive it." Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580.

39—Potter v. Hiscox, 30 Conn. 508.

40—**Slanter v. Favorite, 107 Ind. 291, 57 Am. Rep. 106;** Lamar v. Micou, 112 U. S. 452; McLean v. Hosea, 14 Ala. 194, 48 Am. Dec. 94; Ferguson v. Lowery, 54 Ala. 510, 25 Am. Rep. 718; Gott v. Culp, 45 Mich. 265; State v. Slevin, 93 Mo. 253, 3 Am. St. Rep. 526; Stevens v. Meserve, 73 N. H. 293, 111 Am. St. Rep. 612; Konigmacher v. Kimmel, 1 Penr. & W. (Pa.) 207, 21 Am. Dec. 374; Jones's Appeal, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282; Windon v. Stewart, 43 W. Va. 711; Nagle v. Robins, 9 Wyo. 311.

41—Abrams v. U. S. F. & G. Co., 127 Wis. 579, 115 Am. St. Rep. 1091, 5 L. R. A. (N. S.) 575; Eichelberger's Appeal, 4 Watts (Pa.) 84.

42—**Indiana Trust Co. v. Griffith, 176 Ind. 613, 44 L. R. A. (N. S.) 896, with very extensive note,**

Of course this rule entirely prohibits the employment of an infant's funds in trade, or in manufacturing or speculative enterprises. Even if an interest in a trading concern should come to the infant by inheritance or otherwise, the guardian would have no right to go on with such business, unless authorized by order of court based on clear provisions of statute law.[43]

The guardian sustains in the fullest sense a trust relation to his ward. In all dealings with the ward's property he is bound to look only to the ward's interest. He will not be permitted, therefore, to occupy a position hostile to that of the ward, or to pursue personal interests antagonistic to those of the ward. He can not make a contract with himself so as to gain any personal rights against the ward. For any profit accruing to him from his management of the ward's affairs he is bound to account to the ward; and any property which he may acquire with the ward's funds, or in the course of the ward's business, is subject to a resulting trust in favor of the ward.[44]

Ann. Cas. 1914 A 1023; Scott v. Reeves, 131 Ala. 612; Rogers v. Dickey, 117 Ga. 819; Clark v. Garfield, 8 Allen (Mass.) 427.

But in Nagle v. Robins, 9 Wyo. 311, the court sustained a purchase of corporation stock made for a ward who already owned a large interest in the corporation to prevent a hostile interest from getting control.

Loans on promissory notes secured by mortgages of land in other states cannot be regarded as prima facie a proper investment of trust funds, and a trustee must justify such use of his funds by proof not only of good faith, but of due diligence on his part in ascertaining the safety of the particular investment. State v. Washburn, 67 Conn. 187.

43—Warren v. Union Bank, 157 N. Y. 259, 68 Am. St. Rep. 777, 43 L. R. A. 256; Eichelberger's Appeal, 4 Watts (Pa.) 84.

44—Story Eq. Jur., § 317; Ferguson v. Lowery, 54 Ala. 510, 25 Am. Rep. 718; Short v. Mathis, 107 Ga. 807; Taylor v. Calvert, 138 Ind. 67; Fidelity & Deposit Co. v. Freud, 115 Md. 29; Hayward v. Ellis, 13 Pick (Mass.) 272; Patterson v. Booth, 103 Mo. 402; French v. Currier, 47 N. H. 88; Thornton v. Gilman, 67 N. H. 392; Spelman v. Terry, 74 N. Y. 448; Re Tanner's Estate, 218 Pa. St. 361; Wade v. Pulsifer, 54 Vt. 45; Hutson v. Jenson, 110 Wis. 26.

It follows that if a guardian has himself used the ward's funds in his own business, he will be charged with all the profits which he has made therefrom, or with legal interest, as the ward may elect, or as may be most to his advantage; and if the guardian has converted the ward's property to his own use, the ward has the option to repudiate the transaction and hold the guardian to account as if the conversion or change had not been made, or to affirm it and claim the resulting benefits.[45]

The courts also consider it grave misconduct for the guardian to invest the ward's funds in his own name, and still more so to mingle them with his own funds. The ward's funds should be "earmarked," either by investing or depositing them in the name of the ward, or at least in the name of the guardian as guardian of the ward specifically named. If any funds which the guardian has mingled with his own are lost, he will be held liable for them without proof of any other negligence.[46]

See also the cases cited in note 24.

The rule stated in the text will not be applied so strictly as to prevent a guardian from recovering for necessary goods bought from his own store at the regular price. Moore v. Shields, 69 N. C. 50.

45—Chanslor v. Chanslor, 74 Ky. 663; Goff v. Goff, 123 Ky. 73; Martin v. Davis, 80 Wis. 376; Re Dow, 133 Cal. 446; Scheib v. Thompson, 23 Utah 564. See Moyer v. Fletcher, 56 Mich. 588.

46—**Re Noble's Estate, 178 Pa. St. 460;** Bane v. Bane, 120 Cal. 533, 65 Am. St. Rep. 197; Forbes v. Ware, 172 Mass. 306; Coffin v. Bramlett, 42 Miss. 194, 97 Am. Dec. 449; Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609; Stanley's Appeal, 8 Pa. St. 431, 49 Am. Dec. 530; Hall v. Turner, 78 Vt. 62, 61 Am. Dec. 763.

"The rule may be technical and arbitrary to some extent, but it is based upon the soundest principles of practical business and integrity and approved by the highest courts of this country and of England, with such unanimity of judgment as to make it an established principle of law, that if a guardian deposits the money in his hands belonging to the heirs in a bank in his own name and to his own credit, without any earmarks or indicia to distinguish it as the money of the heirs, or of the estate, or trust funds, and the bank fails, it will be held to be his own personal loss and not that of the heirs. No circum-

§ 163. **The guardian's accounts.** On reaching majority the ward has the legal right himself to settle the accounts of the guardianship with the guardian, and by his release to discharge him from further liability.[47]

But the considerations which throw suspicion upon a contract between guardian and ward made soon after the ward's majority apply with at least equal force to a settlement of the guardian's account agreed upon between them; and the courts will not sustain such a settlement as a bar to the ward's rights unless it is clearly shown that the settlement was a fair one, and that the ward acted in entire freedom from the guardian's influence, and upon full knowledge as to the facts and his rights thereupon.[48]

stances will justify it if such is the character of the deposit. It is not a question of good faith or of integrity; it is a question of naked fact, which determines its character." Booth v. Wilkinson, 78 Wis. 652, 23 Am. St. Rep. 443. So in State v. Greensdale, 106 Ind. 364, 55 Am. Rep. 753, a guardian who had accepted as part of the ward's estate a note payable to his predecessor individually was held to have taken it at his own risk.

But in Virginia, where the guardian deposited money in his own name, but without mingling it with his own funds, and it was lost by the general collapse of the war, the form of the deposit not affecting it, he was held not liable. Parsley v. Martin, 77 Va. 376, 46 Am. Dec. 733.

In Barney v. Parsons, 54 Vt. 623, 48 Am. Dec. 94, a guardian who had lent some of his own money and some of the ward's, and taken a single note payable to himself, was held not liable for the loss of the money by the bankruptcy of the maker where he had kept a full record of the interest of the ward in the note.

47—**Re Alexander, 156 Pa. St. 368;** Davenport v. Olmstead 43 Conn. 75; Ela v. Ela, 84 Me. 423; Boynton v. Dyer, 18 Pick. (Mass.) 1, 8, note; Brown v. Snell, 57 N. Y. 286; Forbes v. Reynard, 113 App. Div. (N. Y.) 306.

48—**Baum v. Hartman, 226 Ill. 160, 17 Am. St. Rep. 246;** Carter v. Tice, 120 Ill. 277; Gillette v. Wiley, 126 Ill. 310, 9 Am. St. Rep. 587; Ferguson v. Lowery, 54 Ala. 510, 25 Am. Rep. 718; Willis v. Rice, 141 Ala. 168, 109 Am. St. Rep. 26; Short v. Mathis, 107 Ga. 807; Van Rees v. Witzenberg, 112 Iowa 30; Aaron v. Mandel, 78 Ky. 427, 39 Am. Rep. 248; McConkey v. Cockey, 69 Md. 286; Harrison v. Harrison, 21 N. M. 372, L. R. A. 1916 E 854 and note; Douglass v. Ferris, 138 N. Y. 192, 34 Am. St. Rep. 435; Say v. Barnes, 4 Serg.

It is also true that, upon a change of guardians, the new guardian has the power and owes the duty of procuring an account from his predecessor and collecting the balance due thereon. But the new guardian, appointed by the probate court and acting in a sense as his representative, would be guilty of a grave dereliction of duty if he assumed to adjust the account himself, instead of having it submitted to the court and settled by it.

The usual, therefore, and the only proper way for the guardian to render his account is by filing it in the court by which he was appointed, and procuring its approval by that court.

The courts of equity and the probate courts have each inherent jurisdiction of the matter of guardian's accounts, and in the absence of statute or settled local practice the ward may proceed in either court. But the modern practice is to adjust such accounts in the probate court, unless other elements than those of ordinary account are to be adjusted.

§ 164. Annual accounts and final accounts. Two kinds of accounts are commonly required of guardians as of other probate trustees; the annual account, and the final account upon the termination of the trust. It is usually required by statute or by probate practice that the guardian shall at least once a year file in court an account of his trust to that time. But such annual accounts have not the characteristics of a *lis inter partes*. The party in interest is still a minor, the person appointed by law to care for his interests is in this respect the adverse party, there is usually no requirement of notice and hearing, and the account is required primarily for the information of the court, so

& R. (Pa.) 112, 8 Am. Dec. 679; Hall v. Turner, 78 Vt. 62; Waller v. Armistead, 2 Leigh (Va.) 11, 21 Am. Dec. 594.

And see Daniel v. Talon, 53 Okla. 666, 4 A. L. R. 704.

In Hayes v. Parker, 41 N. J. Eq. 630, the ward was not permitted

that it, as well as interested parties, may be informed as to the situation of the estate and the conduct of the guardian. The statement of such account is not, therefore, *res judicata*, and on final account the ward has a right to investigate the guardian's dealings with the estate from the beginning. But the annual settlements are *prima facie* evidence of the state of the account. And it is evident that, as to the receipts with which the guardian charges himself, and as to the expenses and compensation which he claims, the annual accounts would practically be conclusive against him, though not as against the ward.[49]

On the other hand, when the final account is filed the ward either is of age, or is represented by a new guardian charged with protecting his interests, notice is always required to be given and a formal hearing had on the approval of the account, and the settlement of the final account constitutes a judgment conclusive between the ward on one side and the guardian and his sureties on the other, which can only be impeached by proof of fraud or such other facts as would affect or invalidate the judgments of other courts.[50]

to maintain a bill in equity for an account after settlement made by him, although he was under age at the time of the settlement, it appearing that he had deceived his guardian as to his age, and that the latter had acted with entire good faith and fairness.

49—State v. Peckham, 136 Ind. 198; Blake v. Pegram, 101 Mass. 592; Butler v. Legro, 62 N. H. 350, 13 Am. St. Rep. 573; Re Hawley, 104 N. Y. 250; Yeager's Appeal, 34 Pa. St. 173; Willis v. Fox, 25 Wis. 646.

The annual accounts may bind the guardian, but they can have no such effect against the ward. Yeager's Appeal, 34 Pa. St. 173.

The annual account was held conclusive against the guardian in Coffin v. Bramlett, 42 Miss. 194, 97 Am. Dec. 449.

50—**Braiden v. Mercer, 44 Ohio St. 339;** Re Wells, 140 Cal. 349; Ryan v. People, 165 Ill. 143; Castetter v. State, 112 Ind. 445; Knox v. Kearns, 73 Iowa 286; Rice v. Wilson, 129 Mich. 520; Jacobson v. Anderson, 72 Minn. 426; May v. May, 189 Mo. 489; Com. v. Moltz, 10 Pa. St. 527, 51 Am. Dec. 499; Shallenberger's Appeal, 21 Pa. St. 337; Scoville v. Brock, 75 Vt. 243, 79 Vt. 449, 118 Am. St. Rep. 975.

Even the final account may be

§ 165. The form and contents of the account. The guardian's account should commonly be in the form of an ordinary bookkeeper's balanced account, with all the charges against the guardian upon one side, the credits to which he is entitled on the other, and a final balance indicating the amount of the funds for which he is then chargeable.

The regular and proper course is to begin the account by charging the guardian with the amount of personal property which appears upon the inventory, if the account is the first one filed since the inventory, and otherwise with the balance as it appears on the previous account. If certain property has been sold for more than the inventory price, the resulting profit should be charged against the guardian as a receipt; if certain property has been sold for less than the inventory, or has been lost or worn out, the guardian should credit himself with such depreciation or loss. The records of the court will thereupon show the complete course of the estate from the inventory to the final account.

To the amount of the inventory should be added, on the debit side of the account, all sums which have been received by the guardian as income, profits, or in any other way. No irregularity as to the source or manner of receipt will excuse the guardian from accounting for sums

opened for fraud in concealing property or in concealing material facts from the court. Lataillade v. Orena, 91 Cal. 565, 25 Am. St. Rep. 219; Witt v. Day, 112 Iowa 110; Re Moore, 112 Me. 119, Ann. Cas. 1917 A 645.

It was held in State v. Peckham, 136 Ind. 198, and in State v. Parsons, 147 Ind. 579, 62 Am. St. Rep. 430, that a settlement made by a guardian upon resigning his office, the ward still being a minor and the guardianship continuing, is to be regarded as an annual account rather than as a final account within the above distinction; and in May v. May, 189 Mo. 485, that a final account rendered without actual notice to the ward should be treated as equivalent in effect to an annual account.

actually received on the ward's behalf.[51]

Any funds which by the exercise of due diligence he would have received, as, for instance, sums due to the ward which he negligently failed to collect, or income which was lost by his failure to properly invest the funds or rent the real estate, will also be charged to him by the court.[52]

If he himself was indebted to the ward's estate, his duty to collect the debt makes it immediately an asset by implication of law, and it is treated not as a mere debt, but as a part of the ward's estate held by him as guardian, and for which his sureties are liable.[53]

A puzzling situation often arises where the guardian was previously administrator, executor, or trustee, and as such held trust funds to which the ward became entitled at the termination of the trust. If there is a failure to eventually pay over these funds, the question often arises whether the default was as guardian or in the previous trust, the importance of the question arising from the fact that one set of sureties may be liable for his acts as guardian, and another set for his acts in other capacities.

If any definite act of transfer has taken place, of course the guardian becomes liable as such; if in his previous trust he has credited himself with the funds as paid over to himself as guardian, he is liable as guardian because

51—Porter v. Fillebrown, 119 Cal. 235; McDowell v. Caldwell, 2 McCord Eq. (S. C.) 43, 16 Am. Dec. 635; State v. Peterson, 36 Ind. App. 269; Hutson v. Jenson, 110 Wis. 26.

52—Potter v. Hiscox, 30 Conn. 20; Short v. Mathis, 107 Ga. 807; Alcon v. Coons, 42 Ind. Ap. 537; Boynton v. Dyer, 18 Pick. (Mass.) 1; Pierce v. Prescott, 128 Mass. 140; Shurtleff v. Rile, 140 Mass. 213; Culp v. Standford, 112 N. C. 664; Landmesser's Appeal, 126 Pa. St. 115, 12 Am. St. Rep. 854.

Where an attorney had embezzled $1,100 collected by him by suit, the guardian was held not liable for failure to attempt collection from the attorney by criminal or disbarment proceedings, there being no method of direct collection. Landmesser's Appeal, *supra*.

As to the standard of diligence to be applied, see *ante*, notes 40

estopped to deny the truth of his own entry, and also because it was his duty as guardian to enforce payment of the ward's funds from the previous trust, and any other guardian presumptively would have done so. If the defalcation actually occurred during the period of the previous trust, it may often happen that the guardian is liable in both capacities: as administrator or executor because of the actual default committed by him in that capacity, and as guardian because of his failure to take proper steps for the enforcement of the rights of the ward.[54]

For such reasonable labor by the ward as is incident to his training in habits or industry or his position in the guardian's family, the guardian is not liable to account to him; but if the labor entirely or partially compensated the guardian for the board furnished by him to the ward, it should be taken into account in fixing the allowance for such board. And if the ward regularly worked for the guardian so as to earn substantial wages, of course the guardian will be liable to account to him therefor.[55]

42 and 44.

53—U. S. F. & G. Co. v. Smith, 40 Ind. Ap. 136; Mattoon v. Cowing, 13 Gray (Mass.) 387; Sargent v. Wallis, 67 Tex. 483; Haskell v. Jewell, 59 Vt. 91; Martin v. Davis, 80 Wis. 376; Hutson v. Jenson, 110 Wis. 26.

54—**State v. Whitehouse, 80 Conn. 111**; Re Noll, 10 App. Div. (N. Y.) 356; Re Brown, 72 Hun (N. Y.) 160.

In Carroll v. Bosley, 6 Yerg. (Tenn.) 220, 27 Am. Dec. 460, it was held that where the administrator had settled his estate, and should have remitted to himself as guardian, but failed to do so, he was liable as guardian and not as administrator. In State v. Branch, 134 Mo. 592, 36 Am. St. Rep. 533, and in Re Switzer, 201 Mo. 66, 119 Am. St. Rep. 731, in the same situation, it was held that the former trustee was liable, and the guardian not liable. With this seems to agree Conkey v. Dickinson, 13 Metc. (Mass.) 51.

The true rule would seem to be, as stated in the text, that the delinquent should be liable in both capacities; as administrator, for having failed to pay over the funds in his hands; and as guardian, for having failed to collect sums due to him.

55—Haskell v. Jewell, 59 Vt. 91; Phillips v. Davis, 2 Sneed (Tenn.) 520, 62 Am. Dec. 472.

The guardian must account for the value of the ward's labor if it has been a source of substantial

On the credit side of the account the guardian will be allowed all expenses properly incurred in the execution of his trust, such as repairs, taxes and insurance, and all sums rightfully chargeable to the ward's estate and paid by the guardian. This will include the legal expenses of the guardianship, and the cost of any litigation, if the guardian has acted reasonably and prudently for the ward's interest in suing or defending.[56]

The primary object of the guardianship is to provide for the proper maintenance and education of the ward; and if the ward has sufficient means to make it proper, or if the circumstances make it necessary, to support him from the estate, proper charges for board and education furnished or procured by the guardian will be allowed.

Expenditures for the ward's support should be limited if possible to the income, and it has been held in England and in many of the United States that expenditures in excess of income will not be allowed unless they were ordered by the court, except in cases of extreme necessity.[57] But the better modern rule seems to be that the limitation of expenditures for support to the income is merely one of caution, and that such expenditures as were required for the proper support and education of the ward will be approved, although they involved an encroachment on the prin-

profit to him. "While guardians should encourage habits of industry in their wards, they have no right to profit by them." Beam's Appeal, 96 Pa. St. 74.

As to wages which the ward collected and voluntarily spent upon the family expenses of himself and his sisters, see Shurtleff v. Rile, 140 Mass. 213.

56—Kingsbury v. Powers, 131 Ill. 182; Re Tolifaro, 113 Iowa 747; Epperson v. Nugent, 57 Miss. 45, 34 Am. Dec. 434; Pyatt v. Pyatt, 44 N. J. Eq. 491.

But not the expense of litigation which was caused chiefly by his own fault. Blake v. Pegram, 109 Mass. 541; Re Mulholland, 154 Pa. St. 441.

57—Hudson v. Newton, 83 Ark. 223; McDowell v. Caldwell, 2 McCord Eq. (S. C.) 43, 16 Am. Dec. 635; Villard v. Robert, 2 Strobh. Eq. (S. C.) 40, 49 Am. Dec. 654; Beeler v. Dunn, 3 Head (Tenn.) 87, 75 Am. Dec. 761; Phillips v. Davis, 2 Sneed (Tenn.) 520, 62

cipal of the fund, and were not ordered in advance by the court.[58]

There is this important qualification to the right of the guardian to charge for the support of the ward: that if the guardian be also the ward's father, he will not be allowed to charge the account with such expenditures, since it is the father's primary duty himself to support his minor child; and on the same principle payments made by a guardian to the ward's father for support will not be allowed.[59]

But if the father is so poor as to be unable to support the ward, or if the ward's fortune is so far superior to the father's means that he ought to have a better maintenance and education than the father is able to give him, the court will make an allowance to the father from the ward's estate.[60]

The courts look more favorably upon the claim of a widowed mother for her child's support than on that of the father; she is commonly considered not under obligation to support from her own resources or by her own labor a child who has sufficient means of his own, and is therefore

Am. Dec. 472; Windon v. Stewart, 43 W. Va. 711.

58—Boyes's Estate, 151 Cal. 143; Davis v. Harkness, 6 Ill. 173, 41 Am. Dec. 184; Dawes v. Howard, 4 Mass. 97; Duffy v. Williams, 133 N. C. 195; Cutting v. Sherzinger, 40 Ore. 353; Olsen v. Thompson, 77 Wis. 666.

For a full citation and analysis of the cases, see 15 Am. & Eng. Encyc., 2nd ed., 100-101. It will appear therefrom, as well as by the cases selected in note 57, *supra*, that the strict rule is practically confined to the southern states. And see the note 5 A. L. R. 632.

59—Windon v. Stewart, 43 W. Va. 711; Presley v. Davis, 7 Rich. Eq. (S. C.) 105, 62 Am. Dec. 396.

60—**Watts v. Steele, 19 Ala. 656, 54 Am. Dec. 207**; Bedford v. Bedford, 136 Ill. 354; Watson v. Watson, 183 Ky. 516, 3 A. L. R. 1575; McGreary v. McGreary, 189 Mass. 539; Hoga v. Look, 15 Gratt. (Va.) 513, 78 Am. Dec. 635.

But if the parents were in comfortable circumstances and supported their children in the family with no thought of changing therefor, they will not be allowed to charge for the past expenditures afterward, when they be-

permitted to charge the ward's estate for the expenses of his board and education.[61]

If the guardian, not being the father, takes the ward into his own family, or if he lives in the family of some relative who has assumed a parental relation to him, the question is one of more difficulty. *Prima facie* there is no obligation upon such persons to support the ward, and they may be allowed for the expenses of his maintenance; but if from the relationship of the parties, the mode in which the ward was treated, the benefit received from his labor, the declarations of the one caring for him, and the other circumstances of the case, an intention not to charge for his maintenance is reasonably to be imputed to the *quasi* parent, he will not be allowed afterwards to recall the gift and claim an allowance.[62]

come poor. Re Tolifaro, 113 Iowa 747.

The father will not be allowed sufficient to support other children and a second wife in a style suited to the ward's fortune; to allow his ward's proportionate part of the cost of the establishment is the utmost that will be done. McKnight v. Walsh, 23 N. J. Eq. 136.

61—**Ellis v. Soper, 111 Iowa 631;** Re Beisel, 110 Cal. 702; Com. v. Lee, 120 Ky. 433; Melanefey v. O'Driscoll, 164 Mass. 422; Re Besondy, 32 Minn. 385, 50 Am. Rep. 579; Guion v. Guion, 16 Mo. 48, 57 Am. Dec. 223.

The mother can only charge for actual outlay, not for her services in the care of a young child. Keeney v. Henning, 64 N. J. Eq. 65.

Where she received the child's labor and wages, and had the use of its real estate, and kept no account of credits or charges, she will not be allowed to charge for support. Re Livernois, 78 Mich. 330.

Where the mother stated in her first annual account that the wards were living with her and she should make no charge for their board and clothing, her sureties cannot claim a credit for board. Hutson v. Jenson, 110 Wis. 26.

Whether or not a mother is obliged to herself support her wards having property, it is certainly her right to do so; and her creditors cannot demand that she be credited with their support in settling her guardianship account. Hanford v. Prouty, 133 Ill. 339.

For an elaborate opinion by the vice-chancellor, holding that the widowed mother's duty is co-extensive with that of the father, see Alling v. Alling, 52 N. J. Eq. 92. But this opinion seems hardly consistent with the prior decision

The items of expenditure allowed for the ward's maintenance and education differ so much with the amount of the estate and the needs of the ward that no general rules can be stated. Economy is not to be regarded as the sole or primary consideration, but rather the bringing up of the ward so as to fit him for the position in life which he is to fill, if the amount of his estate permits it. A broad field of discretion is therefore given to the court to determine the scale of expenditure which is proper, in view of the amount of the ward's estate and the future position for which he should be trained.

For all losses of funds which have occurred without negligence on the part of the guardian he is entitled to credit. But any credit claimed for the loss of money or invested funds will raise the entire question of the exercise by the guardian of that degree of care which the law requires of him.[63]

The last credit in a guardian's account will ordinarily be his compensation for the discharge of the trust. He is

of the Court of Errors and Appeal in Pyatt v. Pyatt, 46 N. J. Eq. 285. See also *ante*, § 140.

62—**Gerdes v. Weiser, 54 Iowa 591, 37 Am. Rep. 229.** Gerdes v. Weiser and Barnes v. Ward, Busbee Eq (N. C.) 93, 57 Am. Dec. 590, were cases where the guardian was a stepfather. McDowell v. Caldwell, 2 McCord Eq. (S. C.) 43, 16 Am. Dec. 635, was the case of a brother-in-law, and Alexander v. Hillebrand, 140 Mich. 490, 112 Am. St. Rep. 417, of a brother.

For an interesting case where payments by the guardian to a step-father were questioned, see Brown's Appeal, 112 Pa. St. 18.

In State v. Slevin, 93 Mo. 253, 3 Am. St. Rep. 526; Otis v. Hall, 117 N. Y. 131; and Abrams v. U. S. F. & G. Co., 127 Wis. 579, 115 Am. St. Rep. 1091, 5 L. R. A. (N. S.) 575, the guardian, not a relative, took the ward into his family and was held to stand *in loco parentis*.

Where a guardian took a child from his mother who was willing to support him at her own cost, and kept him in his own family in idleness, he cannot charge for his support. Clark v. Clark, 8 Paige Ch. (N. Y.) 152, 35 Am. Dec. 676.

63—See the cases cited in notes 40, 42, 44 and 52.

For a review of the cases arising from investment in confederate funds by guardians in the confederate states, and the conse-

entitled to credit himself with a reasonable compensation for the time spent by him, and for his care and supervision of the estate. In some jurisdictions the compensation is a fixed commission, prescribed by statute. In the absence of a statutory rule it is to be fixed in the discretion of the court to which the account is rendered in view of the services rendered by the guardian and of all the circumstances of the estate. Gross breach of his duty by the guardian is sometimes punished by a total disallowance of compensation.[64]

It is the duty of a guardian, in making his account either with the ward or to the court, to make full disclosure of all facts necessary to a complete understanding of the business in hand. Failure to do so is a fraudulent breach of trust.[65]

quent losses, see 15 Am. & Eng. Encyc., 2nd ed., 108.

64—The considerations affecting the rate of compensation proper to be allowed are well discussed in Gott v. Culp, 45 Mich. 265. Compensation was disallowed in Glasswell v. Glasswell, 147 Cal. 510; Re Moore, 112 Me. 119, Ann. Cas. 1917 A 645; Pyatt v. Pyatt, 44 N. J. Eq. 491; Albert's Appeal, 128 Pa. St. 613, and Scheib v. Thompson, 23 Utah 564.

65—Re Moore, 112 Me. 119, Ann. Cas. 1917 A 615.

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